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United States 1365

Circuit Court of Appeals

For the Ninth Circuit

THE MOHAWK RUBBER COMPANY OF NEW
YORK, INC., a corporation,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHER-
RILL, individually and as co-partners doing
business under the firm name and style of
MUNNELL & SHERRILL,

Defendants in Error.

Transcript of Record

Upon Writ of Error to the United States District
Court of the District of Oregon.

FILED

OCT 26 1923

F. O. MONTGOMERY

No.

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Attorneys of Record

The names and addresses of the attorneys of record in the within entitled cause are as follows:

Beach & Simon and S. J. Bischoff, Attorneys for plaintiff and plaintiff in error, Board of Trade Building, Portland, Oregon.

Cake & Cake and L. A. Liljeqvist, Attorneys for defendants and defendants in error, Yeon Building, Portland, Oregon.

Complaint

Comes now the plaintiff above named and alleges:

I.

That at all the times hereinafter mentioned the plaintiff, above named, was and still is a corporation duly organized, existing and doing business under, and by virtue of the laws of the State of New York.

II.

That at all the times hereinafter mentioned the defendants above named were and still are co-partners doing business under the firm name and style of Munnell & Sherrill and are citizens of the State of Oregon.

III.

That on December 2, 1920, for valuable consideration, the defendants made, executed and delivered to the plaintiff their certain promissory note in words and figures as follows:

"\$2633.36. Portland, Ore., Dec. 2, 1920.

"February 10th after date without grace we promise to pay to the order of Mohawk Rubber Co. of N. Y. at Portland, Oregon, Twenty-six Hundred Thirty-three and 36-100 Dollars in Gold Coin of the United States of America with interest thereon in like Gold Coin at the rate of 6 per cent per annum from date until paid, for value received. Interest payable at maturity and in case suit or action is instituted to collect this note, or any portion thereof, promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees.

No.

Munnell & Sherrill,

Due Feb. 10, 1921.

By E. J. Munnell."

IV.

That defendants have failed and refused to pay the whole or any part of the aforesaid note or any interest thereon although due demand therefor has been made and there is now due and owing thereon from defendants to plaintiff the sum of Twenty-six Hundred Thirty-three and 36-100 Dollars (\$2633.36) with interest thereon at the rate of six (6) per cent per annum from December 2, 1920.

V.

That the plaintiff is now the owner and holder of the aforesaid note.

VI.

That the sum of Two Hundred Fifty (\$250)

Dollars is a reasonable sum to be allowed as attorney's fees for the prosecution of this action to enforce payment of the aforesaid note.

For a SECOND cause of action, plaintiff alleges:

VII.

That at all the times hereinafter mentioned the plaintiff, above named, was and still is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York.

VIII.

That at all the times hereinafter mentioned the defendants above named were and still are co-partners doing business under the firm name and style of Munnell & Sherrill, and are citizens of the State of Oregon.

IX.

That on December 2, 1920, for valuable consideration, the defendants made, executed and delivered to the plaintiff their certain promissory note in words and figures as follows:

"\$2633.36. Portland, Ore., Dec. 2, 1920.

"April 10th after date without grace we promise to pay to the order of Mohawk Rubber Co. of N. Y. at Portland, Oregon, Twenty-six Hundred Thirty-three and 36-100 Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 6 per cent per annum from date until paid, for value received, interest payable at

maturity, and in case suit or action is instituted to collect this note, or any portion thereof, promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

No. Munnell & Sherrill,
Due Apr. 10, '21. By E. J. Munnell.

X.

That defendants have failed and refused to pay the whole or any part of the aforesaid note or any interest thereon although due demand therefor has been made and there is now due and owing thereon from the defendants to plaintiff the sum of Twenty-six Hundred Thirty-three and 36-100 Dollars (\$2633.36) with interest thereon at the rate of six (6) per cent per annum from December 2, 1920.

XI.

That the plaintiff is now the owner and holder of the aforesaid note.

XII.

That the sum of Two Hundred Fifty (\$250.00) Dollars is a reasonable sum to be allowed as attorney's fees for the prosecution of this action to enforce payment of the aforesaid note.

For a THIRD cause of action, plaintiff alleges:

XIII.

That at all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York.

XIV.

That at all the times hereinafter mentioned the defendants above named were and still are co-partners doing business under the firm name and style of Munnell & Sherrill and are citizens of the State of Oregon.

XV.

That on December 2, 1920, for valuable consideration, the defendants made, executed and delivered to the plaintiff their certain promissory note in words and figures as follows:

“\$2633.36. Portland, Ore., Dec. 2, 1920.

May 10th after date without grace we promise to pay to the order of Mohawk Rubber Company of N. Y. at Portland, Oregon, Twenty-six Hundred Thirty-three and 36-100 Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 6 per cent per annum from date until paid, for value received, interest payable at maturity, and in case suit or action is instituted to collect this note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

No. Munnell & Sherrill,

Due May 10, '21. By E. J. Munnell.”

XVI.

That defendants have failed and refused to pay the whole or any part of the aforesaid note or any

interest thereon although due demand therefor has been made and there is now due and owing thereon from the defendants to plaintiff the sum of Twenty-six Hundred Thirty-three and 36-100 Dollars (\$2633.36) with interest thereon at the rate of six (6) per cent per annum from December 2, 1920.

XVII.

That the plaintiff is now the owner and holder of the aforesaid note.

XVIII.

That the sum of two Hundred Fifty (\$250.00) Dollars is a reasonable sum to be allowed as attorney's fees for the prosecution of this action to enforce payment of the aforesaid note.

For a FOURTH cause of action plaintiff alleges:

XIX.

That at all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York.

XX.

That at all the times hereinafter mentioned the defendants above named were and still are co-partners doing business under the firm name and style of Munnell & Sherrill and are citizens of the State of Oregon.

XXI.

That between November 8, 1920, and November 9, 1921, the plaintiff sold and delivered to the defendants, at their special instance and request,

goods, wares and merchandise, consisting of automobile tires and inner-tubes of the agreed price and value of Eleven Thousand Seven Hundred Thirty-nine and 75-100 (\$11,739.75) Dollars.

XXII.

That the defendants have failed and refused to pay the whole or any part of the aforesaid sum of Eleven Thousand Seven Hundred and Thirty-nine and 75-100 (\$11,739.75) Dollars, although due demand therefor has been made, except that defendants have paid on account thereof the total sum of Five Thousand and Six and 74-100 (\$5006.74) Dollars, leaving a balance due from the defendants to the plaintiff of the sum of Sixty-seven Hundred Thirty-three and 01-100 (\$6733.01) Dollars with interest thereon at the rate of six (6) per cent per annum from November 9, 1921.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of Twenty-six Hundred Thirty-three and 36-100 (\$2633.36) Dollars with interest thereon at the rate of six (6) per cent per annum from December 2, 1920, together with Two Hundred Fifty (\$250.00) Dollars attorney's fees on the First Cause of Action; the further sum of Twenty-six Hundred Thirty-three and 36-100 (\$2633.36) Dollars with interest thereon at the rate of six (6) per cent per annum from December 2, 1920, together with Two Hundred Fifty (\$250.00) Dollars attorney's fees on the Second Cause of Action; the further sum of Twenty-six Hundred

Thirty-three and 36-100 (\$2633.36) Dollars with interest thereon at the rate of six (6) per cent per annum from December 2, 1920, together with Two Hundred Fifty (\$250.00) Dollars attorney's fees on the Third Cause of Action; and the further sum of Sixty-seven Hundred Thirty-three and 01-100 (\$6733.01) Dollars with interest thereon at the rate of (6) per cent per annum from November 9, 1921, on the Fourth Cause of Action, together with the costs and disbursements of the plaintiff incurred herein.

BEACH & SIMON, and
S. J. BISCHOFF,
Attorneys for Plaintiff.

STATE OF OREGON,

County of Multnomah, ss.

I, N. D. Simon, being first duly sworn, say: That I am one of the plaintiff's attorneys in the above entitled action and that the foregoing complaint is true as I verily believe. The reason this verification is made by deponent is that no officer of the plaintiff corporation is now within the State of Oregon.

N. D. SIMON.

Subscribed and sworn to before me this 10th day of May, 1922.

(Seal)

S. J. BISCHOFF,
Notary Public for Oregon.

My commission expires March 30, 1923.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed May 12, 1922.

G. H. MARSH, Clerk.

Answer

Comes now the defendants Edgar J. Munnell and Arthur J. Sherrill, and for answer to the complaint of plaintiff filed herein, admit, deny and allege as follows:

I.

Deny each and every allegation contained in said complaint saving and excepting as the same may hereinafter be specifically admitted, qualified or denied.

II.

Answering paragraph I of said complaint, these defendants allege that they have not sufficient information upon which to form a belief as to the truth of the matters herein set out and therefore deny the same.

III.

These defendants admit paragraphs II and III of said complaint.

IV.

Answering paragraph IV of said complaint, these defendants deny that they have refused to pay the whole or any part of said note, or any interest thereon; deny that demand has been made therefor, and deny that there is due and owing on said note the sum of \$2633.36, or that there is due any sum upon said note.

V.

Answering paragraph V of the complaint these defendants allege that they have not sufficient information upon which to form a belief as to the truth of the matters therein set out and therefore deny the same.

VI.

Answering paragraph VI of said complaint, these defendants deny that the sum of \$250.00 or any other sum is a reasonable sum to be allowed as attorney's fees.

Answering the second cause of action contained in said complaint, these defendants deny each and every allegation contained in said second cause of action saving and excepting as the same may hereafter be specifically admitted, qualified or denied.

I.

Answering paragraph VII of said complaint, these defendants allege that they have not sufficient information upon which to form a belief as to the truth of the matters therein set out and therefore deny the same.

II.

These defendants admit paragraphs VIII and IX of said complaint.

III.

These defendants admit paragraphs VIII and said second cause of action deny that they have failed and refused to pay the whole or any part of said note, or any interest thereon; deny that de-

mand has been made therefor, and deny that there is now due and owing from the defendants to the plaintiff the sum of \$2633.36, or any other sum upon said note.

IV.

Answering paragraph XI of said second cause of action, these defendants allege that they have not sufficient information to form a belief as to the truth of the matters therein set out and therefore deny the same.

V.

Answering paragraph XII of the second cause of action, these defendants deny that the sum of \$250.00 or any other sum is a reasonable sum to be allowed as attorney's fees.

Answering the third cause of action contained in plaintiff's complaint, these defendants deny each and every allegation contained therein saving and excepting as the same may hereafter be specifically admitted, qualified or denied.

I.

Answering paragraph XIII of the third cause of action, these defendants allege that they have not sufficient information upon which to form a belief as to the truth of the matters and things therein set forth, and therefore deny the same.

II.

These defendants admit paragraphs XIV and XV of said third cause of action.

III.

Answering paragraph XIV of the third cause of action, these defendants deny that they have failed and refused to pay the whole or any part of said note or any interest thereon; deny that demand has been made therefor, and deny that there is now due and owing thereon from the defendants to plaintiff the sum of \$2633.36, or any other sum.

IV.

Answering paragraph XVII of said third cause of action in said complaint, these defendants allege that they have not sufficient information upon which to form a belief as to the truth of the matters therein set out, and therefore deny the same.

V.

Answering paragraph XVIII of said third cause of action, these defendants deny that the sum of \$250.00 or any other sum is a reasonable sum to be allowed as attorney's fees.

Answering the fourth cause of action of plaintiff herein, these defendants deny each and every allegation contained herein, saving and excepting as the same may be hereafter specifically admitted, qualified or denied.

I.

Answering paragraph XIX thereof, these defendants allege that they have not sufficient information upon which to form a belief, as to the truth of the matters therein set out, and therefore deny the same.

II.

These defendants admit paragraphs XX and XXI of said fourth cause of action.

III.

Answering paragraph XXII of the said fourth cause of action, these defendants deny that they have failed or refused to pay the whole or any part of said sum of \$11,739.75; deny that demand has been made therefor; deny that there is a balance of \$5006.74 due or owing from the defendants to plaintiff upon said cause of action, but allege the fact to be that the balance due upon said goods, wares and merchandise bought as aforesaid was and is the sum of \$387.40, which sum was prior to the commencement of this action tendered to plaintiff herein and acceptance thereof refused, and these defendants herewith tender and bring unto the Clerk of this Court the said sum of \$387.40 in full payment of said claim.

For a further and separate answer to the first cause of action of said complaint, these defendants allege as follows:

I.

That the plaintiff herein, Mohawk Rubber Company of New York, Inc., is engaged in the manufacture and sale of automobile tires and tubes, and on or about March in the year 1919 entered into an agreement with the defendants wherein and whereby the said defendants were made the exclusive agents for certain territory including the State

of Oregon to sell the tires of the plaintiff to dealers within said territory.

II.

That thereafter and at various and sundry times these defendants ordered and received from the plaintiff Mohawk tires and tubes, and were charged therefor, and these defendants made payments on said account.

III.

That it was agreed between the plaintiff and defendants that defendants could return Mohawk tires and tubes to the plaintiff and receive credit on their account therefor, and these defendants did at various times return Mohawk tires to plaintiff and did receive credit therefor.

IV.

That in November, 1920, these defendants had a large stock of Mohawk tires and tubes on hand occasioned by the return to these defendants of tires and tubes from their dealers, and at the same time owed to the plaintiff a large sum of money on account for said tires and tubes purchased from the plaintiff by the defendants.

V.

That on or about the day of November, 1920, a settlement of the account of plaintiff with the defendants was made by the parties thereto, and it was agreed between the plaintiff and defendants that instead of shipping tires back to the Mohawk Rubber Company at San Francisco, said

defendants should keep all of said tires on hand under a regular spring dating agrément wherein and whereby they were to pay for said tires during certain months of the spring of 1921, to-wit, the months of, and the said Mohawk Rubber Company did accept and receive in full settlement of the old account of these defendants their certain five promissary notes, two of which have been paid and the remaining three are the same notes set out in plaintiff's first, second and third causes of action, it being understood between the parties plaintiff and defendant that a new agreement and arrangement was being entered into.

VI.

That as a part of said agreement, plaintiff agreed to give unlimited protection to defendants for a decline in price of Mohawk tires, and the said defendant refused to accept said tires on any other arrangement, it being the intention of the parties that in case the Mohawk Rubber Company announced a decline in the price of its tires it was to allow as a credit on the account of these defendants the amount of such decline on the total of Mohawk tires and tubes in the stock of these defendants at the time of the decline.

VII.

That in September, 1921, the plaintiff entered into negotiations with the American Tire & Rubber Company to handle its line of tires in the District

of Oregon, although the defendants herein had the exclusive agency of said district.

VIII.

That these defendants consented to such change of agency by the plaintiff provided Mohawk tires held in stock by the said defendants would be turned over to this plaintiff or its agent, and these defendants be credited with the amount represented by these tires so turned over.

IX.

That the said plaintiff by and through its duly authorized agent consented to such arrangement, and these defendants did deliver to the American Tire & Rubber Company with the consent and at the request of the Mohawk Rubber Company a large quantity of the tires then held in stock by them which were of the agreed value of \$9814.20.

X.

That on the 15th day of November, 1921, the said Mohawk Rubber Company notified these defendants of a decline in price of tires and these defendants have charged the said Mohawk Rubber Company with the sum of \$249.44 which represents the amount of the decline of all tires held by them in stock at such time.

XI.

That the said sum of \$9814.20 referred to in paragraph IX hereof and the said sum of \$249.44 referred to in paragraph X hereof, making a total of \$10,053.64, were to be credited on the sums of

money represented by the note in this cause of action, and in the second and fourth causes of action set out in the complaint of plaintiff on file herein, and is a full and complete payment and discharge of the note referred to in plaintiff's first cause of action.

For a further and separate answer to the second cause of action of said complaint, these defendants allege as follows:

I.

That the plaintiff herein, Mohawk Rubber Company of New York, Inc., is engaged in the manufacture and sale of automobile tires and tubes, and on or about March in the year 1919 entered into an agreement with the defendants wherein and whereby the said defendants were made the exclusive agents for certain territory including the State of Oregon to sell the tires of the plaintiff to dealers within said territory.

II.

That thereafter and at various and sundry times these defendants ordered and received from the plaintiff Mohawk tires and tubes, and were charged therefor and these defendants made payments on said account.

III.

That it was agreed between the plaintiff and defendants that defendants could return Mohawk tires and tubes to the plaintiff and receive credit on their account therefor, and these defendants did at var-

ious times return Mohawk tires to plaintiff and did receive credit therefor.

IV.

That in November, 1920, these defendants had a large stock of Mohawk tires and tubes on hand occasioned by the return to these defendants of tires and tubes from their dealers, and at the same time owed to the plaintiff a large sum of money on account for said tires and tubes purchased from the plaintiff by the defendants.

V.

That on or about the day of November, 1920, a settlement of the account of plaintiff with the defendants was made by the parties thereto, and it was agreed between the plaintiff and defendants that instead of shipping tires back to the Mohawk Rubber Company at San Francisco said defendants should keep all of said tires on hand under a regular spring dating agreement wherein and whereby they were to pay for said tires during certain months of the spring, to-wit, the months of -----, and the said Mohawk Rubber Company did accept and receive in full settlement of the old account of these defendants their certain five promissory notes, two of which have been paid and the remaining three are the same notes set out in plaintiff's first, second and third causes of action, it being understood between the parties plaintiff and defendant that a new agreement and arrangement was being entered into.

VI.

That as a part of said agreement plaintiff agreed to give unlimited protection to defendants for a decline in price of Mohawk tires, and the said defendants refused to accept said tires on any other arrangement, it being the intention of the parties that in case the Mohawk Rubber Company announced a decline in the price of its tires, it was to allow as a credit on the account of these defendants the amount of such decline on the total of Mohawk tires and tubes in the stock of these defendants at the time of the decline.

VII.

That on September, 1921, the plaintiff entered into negotiations with the American Tire & Rubber Company to handle its line of tires in the District of Oregon, although the defendants herein had the exclusive agency for said district.

VIII.

That these defendants consented to such change of agency by the plaintiff provided Mohawk tires held in stock by the said defendants would be turned over to this plaintiff or its agent, and these defendants be credited with the amount represented by these tires so turned over.

IX.

That the said plaintiff by and through its duly authorized agent consented to such arrangement, and these defendants did deliver to the American Tire & Rubber Company with the consent and at

the request of the Mohawk Rubber Company a large quantity of the tires then held in stock by them which were of the agreed value of \$9814.20.

X.

That on the 15th day of November, 1921, the said Mohawk Rubber Company notified these defendants of a decline in price of tires and these defendants have charged the said Mohawk Rubber Company with the sum of \$249.44, which represents the amount of the decline of all tires held by them in stock at such time.

XI.

That the said sum of \$9814.20 referred to in paragraph IX hereof and the said sum of \$249.44 referred to in paragraph X hereof, making a total of \$10,053.64, were to be credited on the sums of money represented by the note in this cause of action, and in the second and fourth causes of action set out in the complaint of plaintiff on file herein, and is a full and complete payment and discharge of the note referred to in plaintiff's second cause of action.

For a further and separate answer to the third cause of action of said complaint, these defendants allege as follows:

I.

That the plaintiff herein, Mohawk Rubber Company of New York, Inc., is engaged in the manufacture and sale of automobile tires and tubes and on or about March in the year 1919 entered into

an agreement with the defendants wherein and whereby the said defendants were made the exclusive agents for certain territory including the State of Oregon to sell the tires of the plaintiff to dealers within said territory.

II.

That thereafter and at various and sundry times these defendants ordered and received from the plaintiff Mohawk tires and tubes, and were charges therefor and these defendants made payments on said account.

III.

That it was agreed between the plaintiff and defendants that defendants could return Mohawk tires and tubes to the plaintiff and receive credit on their account therefor, and these defendants did at various times return Mohawk tires to plaintiff and did receive credit therefor.

IV.

That in November, 1920, these defendants had a large stock of Mohawk tires and tubes on hand occasioned by the return to these defendants of tires and tubes from their dealers, and at the same time owed to the plaintiff a large sum of money on account for said tires and tubes purchased from the plaintiff by the defendants.

V.

That on or about the day of November, 1920, a settlement of the account of plaintiff with the defendants was made by the parties thereto,

and it was agreed between the plaintiff and defendants that instead of shipping tires back to the Mohawk Rubber Company at San Francisco, said defendants should keep all of said tires on hand under a regular spring dating agreement wherein and whereby they were to pay for said tires during certain months of the spring of 1921, to-wit, the months of....., and the said Mohawk Rubber Company did accept and receive in full settlement of the old account of these defendants their certain five promissory notes, two of which has been paid and the remaining three are the same notes set out in plaintiff's first, second and third causes of action, it being understood between the parties plaintiff and defendant that a new agreement and arrangement was being entered into.

VI.

That as a part of said agreement plaintiff agreed to give unlimited protection to defendants for a decline in price of Mohawk tires, and the said defendants refused to accept said tires on any other arrangement, it being the intention of the parties that in case the Mohawk Rubber Company announced a decline in price of its tires it was to allow as a credit on the account of these defendants the amount of such decline on the total of Mohawk tires and tubes in the stock of these defendants at the time of the decline.

VII.

That on or about the 12th day of May, 1921, the

Mohawk Rubber Company gave notice to these defendants of a decline in the price of Mohawk tires and tubes to the extent of twenty (20) per cent, and under and by virtue of the agreement between plaintiff and defendants referred to in paragraph VI hereof, these defendants were entitled to a credit of twenty (20) per cent on all tires and tubes then held in stock by these defendants, and these defendants did take an inventory of all Mohawk tires and tubes which they have in stock and forwarded such inventory to the Mohawk Rubber Company with the request that they be given a credit for all such tires in accordance with the terms of the agreement heretofore referred to.

VIII.

That thereafter the said Mohawk Rubber Company agreed to allow to these defendants, and these defendants agreed to accept a credit for such decline referred to in paragraph VII hereof to the amount of \$2633.36, and said Mohawk Rubber Company and these defendants agreed that such amount should be credited up on the note referred to in plaintiff's third cause of action, and agreed that said note should be deemed and treated as fully paid, satisfied and discharged, and no longer an obligation of these defendants.

For a further and separate answer to the fourth cause of action of said complaint, these defendants allege as follows:

I.

That the plaintiff herein, Mohawk Rubber Company of New York, Inc., is engaged in the manufacture and sale of automobile tires and tubes, and on or about March in the year 1919 entered into an agreement with the defendants wherein and whereby the said defendants were made the exclusive agents for certain territory including the State of Oregon to sell the tires of the plaintiff to dealers within said territory.

II.

That thereafter and at various and sundry times these defendants ordered and received from the plaintiff Mohawk tires and tubes and were charged therefor and these defendants made payments on said account.

III.

That it was agreed between the plaintiff and defendants that defendants could return Mohawk tires and tubes to the plaintiff and receive credit on their account therefor, and these defendants did at various times return Mohawk tires to plaintiff and did receive credit therefor.

IV.

That in November, 1920, these defendants had a large stock of Mohawk tires and tubes on hand occasioned by the return to these defendants of tires and tubes from their dealers, and at the same time owed to the plaintiff a large sum of money

on account for said tires and tubes purchased from the plaintiff by the defendants.

V.

That on or about the day of November, 1920, a settlement of the account of plaintiff with the defendants was made by the parties thereto, and it was agreed between the plaintiff and defendants that instead of shipping tires back to the Mohawk Rubber Company at San Francisco, said defendants should keep all of said tires on hand under a regular spring dating agreement wherein and whereby they were to pay for said tires during certain months of the spring of 1921, to-wit, the months of.....
....., and the said Mohawk Ruber Company did accept and receive in full settlement of the old account of these defendants their certain five promissory notes, two of which have been paid and the remaining three are the same notes set out in plaintiff's first, second and third causes of action, it being understood between the parties plaintiff and defendant that a new agreement and arrangement was being entered into.

VI.

That as a part of said agreement plaintiff agreed to give unlimited protection to defendants for a decline in price of Mohawk tires, and the said defendants refused to accept said tires on any other arrangement, it being the intention of the parties that in case the Mohawk Rubber Company announced a decline in the price of its tires it was to allow as a

credit on the account of these defendants the amount of such decline on the total of Mohawk tires and tubes in the stock of these defendants at the times of the decline.

VII.

That in September, 1921, the plaintiff entered into negotiations with the American Tire & Rubber Company to handle its line of tires in the District of Oregon, although the defendants herein had the exclusive agency for said district.

VIII.

That these defendants consented to such change of agency by the plaintiff provided all Mohawk tires held in stock by the said defendants would be turned over to the plaintiff or its agent, and these defendants be credited with the amount represented by these tires so turned over.

IX.

That the said plaintiff by and through its duly authorized agent consented to such arrangement, and these defendants did deliver to the American Tire & Rubber Company with the consent and at the request of the Mohawk Rubber Company a large quantity of the tires then held in stock by them which were of the agreed value of \$9814.20.

X.

That on the 15th day of November, 1921, the said Mohawk Rubber Company notified these defendants of a decline in price of tires and these defendants have charged the said Mohawk Rubber Company

with the sum of \$249.44, which represents the amount of the decline of all tires held by them in stock at such time.

XI.

That the said sum of \$9814.20 referred to in paragraph IX hereof and the said sum of \$249.44 referred to in paragraph X hereof, making a total of \$10,053.64 were to be credited on the notes referred to in the first and second causes of action and on the open account referred to in the fourth cause of action of plaintiff herein, and after crediting the same to the sums mentioned in the first, second and fourth causes of action, there is a balance due and owing to the plaintiff from the defendants of \$387.40, which said sum the defendants before the commencement of this suit offered and tendered to the plaintiff in full payment of its claim, and which said sum of \$387.40 these defendants now bring into this Court in full settlement of all claims and demands as set out in the four causes of action of plaintiff herein.

WHEREFORE, these defendants having fully answered the complaint of plaintiff herein ask this Honorable Court for an order dismissing this complaint, and for a judgment for its costs and disbursements herein.

CAKE & CAKE,
L. J. LILJEQVIST,
Attorneys for Defendants.

STATE OF OREGON,

County of Multnomah, ss.

I, Arthur J. Sherrill, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause; that I have read the foregoing answer, know the contents thereof and the same is true as I verily believe.

ARTHUR J. SHERRILL.

Subscribed and sworn to before me this 9th day of June, 1922.

(Seal)

RALPH H. CAKE,

Notary Public for Oregon.

My commission expires August 23, 1924.

Service by copy admitted this 10th day of June, 1922.

S. J. BISCHOFF,

M. B.

Attorneys for Plaintiff.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed June 10, 1922.

G. H. MARSH, Clerk.

Reply

Comes now the plaintiff above named and for its reply to the further and separate answer, and

I.

Admits that the plaintiff was engaged in the manufacture and sale of automobile tires and tubes and except as herein specifically admitted, denies each and every of the allegations set forth in the

paragraph numbered I of the further and separate answer to the first cause of action.

II.

Admits that plaintiff sold and delivered tires to defendants; that defendants paid for part of the tires sold and delivered and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered II in the further and separate answer to the first cause of action.

III.

Denies each and every of the allegations set forth in the paragraph numbered III of the further and separate answer to the first cause of action.

IV.

Admits that defendants had a large stock of tires and tubes on hand and that they owed plaintiff a large sum of money for tires and tubes purchased by defendants from plaintiffs, and except as herein specifically admitted, denies that it has any knowledge or information as to any of the allegations set forth in the paragraph numbered IV of the further and separate answer, sufficient to form a belief thereon.

V.

Admits that on December 2nd, 1920, defendants made, executed and delivered to the plaintiff their five promissory notes, two of which notes have heretofore been paid and three notes being the notes described in the complaint, and except as

herein specifically admitted, denies each and every of the allegations set forth in the paragraphs of the further and separate answer to the first cause of action numbered V and VI and the whole thereof.

VI.

Admits that in September, 1921, plaintiff sold tires to the American Tire & Rubber Company, and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraphs numbered VII, VIII, IX, X and XI of the further and separate answer to the first cause of action and the whole thereof.

VII.

Admits that the plaintiff was engaged in the manufacture and sale of automobile tires and tubes and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered I of the further and separate answer to the second cause of action.

VIII.

Admits that plaintiff sold and delivered tires to defendants; that defendants paid for part of the tires sold and delivered and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered II in the further and separate answer to the second cause of action.

IX.

Denies each and every of the allegations set forth in the paragraph numbered III of the further

and separate answer to the second cause of action.

X.

Admits that defendants had a large stock of tires and tubes on hand and that they owed plaintiff a large sum of money for tires and tubes purchased by defendants from plaintiffs, and except as herein specifically admitted, denies that it has any knowledge or information as to any of the allegations set forth in the paragraph numbered IV of the further and separate answer, sufficient to form a belief thereof.

XI.

Admits that on December 2nd, 1920, defendants made, executed and delivered to the plaintiff their five promissory notes, two of which notes have heretofore been paid and three notes being the notes described in the complaint, and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraphs of the further and separate answer to the second cause of action numbered V and VI and the whole thereof.

XII.

Admits that in September, 1921, plaintiff sold tires to the American Tire & Rubber Company, and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraphs numbered VII, VIII, IX, X and XI of the further and separate answer to the second cause of action and the whole thereof.

XIII.

Admits that the plaintiff was engaged in the manufacture and sale of automobile tires and tubes and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered I of the further and separate answer to the third cause of action.

XIV.

Admits that plaintiff sold and delivered tires to defendants; that defendants paid for part of the tires sold and delivered and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered II in the further and separate answer to the third cause of action.

XV.

Denies each and every of the allegations set forth in the paragraph numbered III of the further and separate answer to the third cause of action.

XVI.

Admits that defendants had a large stock of tires and tubes on hand and that they owed plaintiff a large sum of money for tires and tubes purchased by defendants from plaintiffs, and except as herein specifically admitted, denies that it has any knowledge or information as to any of the allegations set forth in the paragraph numbered IV of the further and separate answer, sufficient to form a belief thereof.

XVII.

Admits that on December 2nd, 1920, defendants made, executed and delivered to the plaintiff their five promissory notes, two of which notes have heretofore been paid and three notes being the notes described in the complaint, and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraphs of the further and separate answer to the third cause of action numbered V and VI and the whole thereof.

XVIII.

Denies each and every of the allegations set forth in the paragraphs numbered VII and VIII of the further and separate answer to the third cause of action.

XIX.

Admits that the plaintiff was engaged in the manufacture and sale of automobile tires and tubes and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered I of the further and separate answer to the fourth cause of action.

XX.

Admits that plaintiff sold and delivered tires to defendants; that defendants paid for part of the tires sold and delivered and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraph numbered II in the further and separate answer to the fourth cause of action.

XXI.

Denies each and every of the allegations set forth in the paragraph numbered III of the further and separate answer to the fourth cause of action.

XXII.

Admits that defendants had a large stock of tires and tubes on hand and that they owed plaintiff a large sum of money for tires and tubes purchased by defendants from plaintiffs, and except as herein specifically admitted, denies that it has any knowledge or information as to any of the allegations set forth in the paragraph numbered IV of the further and separate answer, sufficient to form a belief thereof.

XXIII.

Admits that on December 2nd, 1920, defendants made, executed and delivered to the plaintiff their five promissory notes, two of which notes have heretofore been paid and three notes being the notes described in the complaint, and except as herein specifically admitted, denies each and every of the allegations set forth in the paragraphs of the further and separate answer to the fourth cause of action numbered V and VI and the whole thereof.

XXIV.

Admits that in September, 1921, plaintiff sold tires to the American Tire & Rubber Company, and except as herein specifically admitted, denies each

and every of the allegations set forth in the paragraphs numbered VII, VIII, IX, X and XI of the further and separate answer to the fourth cause of action and the whole thereof.

WHEREFORE, plaintiff demands judgment as prayed for in the complaint.

BEACH & SIMON,

S. J. BISCHOFF,

G.

Attorneys for Plaintiff.

STATE OF OREGON,

County of Multnomah, ss.

I, N. D. Simon, being first duly sworn, say: That I am one of the attorneys for the plaintiff in the above entitled action and that the foregoing reply is true as I verily believe, that the reason this verification is made by deponent is that there is no officer, agent or director of the plaintiff company now in the State of Oregon.

N. D. SIMON.

Subscribed and sworn to before me this 25th day of July, 1922.

(Seal)

S. J. BISCHOFF,

Notary Public for Oregon.

My commission expires March 30, 1923.

STATE OF OREGON,

County of Multnomah, ss.

Due and timely service of the within reply and the receipt of a duly certified copy thereof, all at

the City of Portland in said County and State, is hereby admitted. July 26th, 1922.

CAKE & CAKE,

L. A. LILJEQVIST,

Attorneys for Defendants.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed July 26, 1922.

G. H. MARSH, Clerk.

Affidavit of Service of Bill of Exceptions

United States of America,

State of Oregon,

County of Multnomah, ss.

I, Gladys L. Farley, being duly sworn on oath, depose and say that on August 15, 1923, I personally served the annexed Bill of Exceptions on the defendants above named by delivering to and leaving with an adult person in charge of the offices of Cake & Cake, attorneys for defendants, at their offices in the Yeon Building, City of Portland, State of Oregon, a true copy thereof duly certified as such by S. J. Bischoff, attorney for plaintiff.

GLADYS L. FARLEY.

Subscribed and sworn to before me this 15th day of August, 1923.

(Seal)

S. J. BISCHOFF,

Notary for State of Oregon.

My commission expires March 30, 1923.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed August 21, 1923.

G. H. MARSH, Clerk.

Bill of Exceptions

BE IT REMEMBERED that on the 15th day of June, 1923, at a stated term of said court before Honorable Robert S. Bean, District Judge, and a jury duly impanelled and sworn, the issues joined in the above entitled cause between said parties came on to be tried before said judge and jury. The plaintiff appearing herein by S. J. Bischoff and Beach & Simon, its attorneys, and the defendants appearing herein by Cake & Cake and L. A. Liljeqvist, their attorneys. S. J. Bischoff thereupon made the opening statement of the case on behalf of the plaintiff and L. A. Liljeqvist thereupon made an opening statement to the jury on behalf of the defendants, and during the said opening statement of the case to the jury by said L. A. Liljeqvist, he stated to the jury in substance and in effect that the defendants would establish that the plaintiff delivered to the defendants tires that were of defective and inferior material and unsalable; that the defendants had resold some of the tires and tubes to their customers and the said customers returned the said merchandise because of the defective and inferior condition and refused to pay defendants therefore, and that as a result thereof, the defendants suffered loss of a great deal of trade and loss of profits from the said sales and that this condition caused defendants considerable financial embarrassment and difficulty.

Whereupon S. J. Bischoff, attorney for plaintiff,

objected to said statement of counsel to the jury on the ground that the pleadings did not present any issue as to the character of the merchandise sold and delivered by plaintiff to defendants, and that any evidence tendered in support of those statements would be immaterial. The court thereupon stated "Let him state his case." Plaintiff thereupon saved an exception to said statement and ruling.

After the opening statements to sustain the issues presented by the pleadings on their respective parties offered the testimony of the following witnesses, to-wit:

BEN C. DEY, a witness called on behalf of the plaintiff, testified as follows, after being duly sworn:

Direct Examination.

Questions by Mr. Bischoff:

You are an attorney at law here, practicing in the District Court of the United States for the District of Oregon?

A. I am.

Q. How long have you been admitted to the Bar, Mr. Dey?

A. Seventeen years, I think.

Q. And practiced in this city, and in the State Courts of the State of Oregon during all of that time?

A. I have, yes.

Q. Will you state please what would be the reasonable fee to be allowed as attorney's fee for the

(Testimony of Ben C. Dey.)

prosecution of an action to recover on three promissory notes, each for the sum of \$2633.33, the notes providing for the payment of such sum as to the court seems reasonable for such attorney's fee.

A. Have you taken any depositions?

Q. The deposition of one witness has been taken, and defenses are interposed against these notes of payment and discharge. The case will probably take from a day and a half to two days to try.

A. How much are you asking for? How much involved?

Q. The three notes total about eighty-one or eighty-two hundred dollars without interest.

A. Five hundred dollars I would say is a fair fee.

Cross Exemination.

Questions by Mr. Liljeqvist:

That is if the notes haven't been paid?

A. If the plaintiff recovered in a trial that takes from one to two days jury trial, where there has been certain preliminary work, such as taking depositions, etc.

Q. Your answer is based upon the total amount of work performed or upon the total amount involved in the notes?

A. Well, my judgment in that is based not so much upon the amount involved. I think whether five thousand or ten thousand dollars isn't the important thing, but a jury trial that runs into two

(Testimony of Ben C. Dey.)

days in the federal court, with the usual preliminaries that go with any action, such as the preparation of pleadings, and arguing motions and demurrers, if any, and taking depositions, I don't care whether five thousand or ten thousand dollars involved, five hundred dollars would be as much as an ordinary attorney would charge a client, and that is the basis the fee ought to go on.

Q. Anyway your answer is based upon a minimum amount of five thousand odd dollars up to any sum to say ten thousand dollars, do I gather?

A. Yes, I think that is right.

Witness excused.

MORRIS E. MASON, a witness examined on behalf of the plaintiff whose testimony was taken by deposition, testified as follows:

Q. 1: State your full name, address and occupation.

A. 1: My name is Morris E. Mason. My address is 194 Highland Avenue, Akron, Ohio. I am Vice-President and Sales Manager of The Mohawk Rubber Company, Akron, Ohio.

Q. 2: What connection, if any, have you with The Mohawk Rubber Company of New York, the plaintiff in the above entitled action?

A. 2: I am president of The Mohawk Rubber Co. of New York, Inc.

Q. 3: State fully the nature, character and ex-

(Testimony of Morris E. Mason.)

tent of your authority and duties in your connection with the plaintiff company.

A. 3: As president of The Mohawk Rubber Co. of New York, Inc., I have authority and control of the sale and distribution of the procedure of the company. It is also my duty to make the agreements and contracts covering the sales and distribution of our products, which duty is granted to no other party except on authority from me.

Q. 4: Is the plaintiff company a partnership or a corporation? If a corporation, please state under the laws of what State the plaintiff company is incorporated.

A. 4: The Mohawk Rubber Co. of New York, Inc., is a corporation, incorporated under the laws of New York.

Q. 5: Has the plaintiff received payment of any part of the principal or interest on the note dated December 2, 1920, due February 10, 1921, made by the defendant?

A. 5: No.

Q. 6: Who is now the owner of the note dated December 2, 1920, and due February 10, 1921, made by defendant to plaintiff for the sum of \$2,633.36?

A. 6: The Mohawk Rubber Co. of New York, Inc.

Q. 7: Has the plaintiff received payment of any part of the principal or interest on the note dated December 2, 1920, due April 10, 1921, made by the defendants?

(Testimony of Morris E. Mason.)

A. 7: No.

Q. 8: Who is now the owner of the note dated December 2, 1920, and due April 10, 1921, made by defendants to plaintiff for the sum of \$2,633.36?

A. 8: The Mohawk Rubber Co. of New York, Inc.

Q. 9: Has the plaintiff received payment of any part of the principal or interest on the note dated December 2, 1920, due May 10th, 1921, made by the defendants?

A. 9: No.

Q. 10. Who is now the owner of the note dated December 2, 1920, and due May 10, 1921, made by defendants to plaintiff for the sum of \$2,633.36?

A. 10: The Mohawk Rubber Company of New York, Inc.

Q. 11: Please give the dates and the amounts of money received by the plaintiff on account of the open account existing between plaintiff and the defendants between November 8th, 1920, and November 9, 1921.

A. 11: The dates and amounts of money received by The Mohawk Rubber Company of New York, Inc., between November 8th, 1929, and November 8, 1921, on account of the open account existing between Munnell & Sherrill are shown on a statement, which I am asking the notary to mark Exhibit "A."

(Testimony of Morris E. Mason.)

S. J. Bischoff: I offer in evidence the statement referred to by the witness.

Received and marked "Plff's. Ex. A."

Plaintiff's Exhibit A
THE MOHAWK RUBBER COMPANY
of New York, Inc.
River and Seconds Ave.

Akron, Ohio.

Munnell & Sherrill,
Portland, Ore.

1921

Mar. 21	203	Cash	211.71	
		Discount.....	5.79	
Apr. 18	357	Cash	572.29	
		Discount.....	29.14	
June 10	554	Cash	51.00	
		Discount.....	2.55	
June 28	695	Cash	902.37	
		Discount.....	45.64	
July 16	800	Cash	1056.79	
		Discount.....	52.84	
Aug. 22	1026	Cash	1000.00	
Aug. 22	1025	Cash	1024.40	
		Discount.....	51.22	
				5005.74

Q. 12: Please give the dates and the amounts of any other credits which the plaintiff has allowed the defendants on account of said open account, and state what each of these credits were for.

A. 12: The dates and amounts of all other credits issued to Munnell & Sherrill by The Mohawk

(Testimony of Morris E. Mason.)

Rubber Company of New York, Inc., since November 8th, 1920, are shown on a statement which I am asking to be attached and to be known as exhibit "B."

S. J. Bischoff: I offer in evidence the statement referred to by the witness.

Received and marked "Plff's. Ex. B."

There were also two credits posted to the books of the Mohawk Rubber Company of New York, Inc., dated December 4th, 1920, No. 332½, \$20.00, and February 28th, 1921, No. 14½, \$68.30, representing advertising allowances for which credit had previously been taken by Munnell & Sherrill, and which we are not showing on either exhibits "A" or "B" for that reason.

The nature of the various credits is indicated on the statements, "Adv." standing for advertising.

Plaintiff's Exhibit B

THE MOHAWK RUBBER COMPANY

of New York, Inc.

River and Second Ave.

Akron, Ohio.

Munnell & Sherrill,

Portland, Ore.

1920

Dec. 4	339	Frts. Allow.	214.68
Dec. 15	342	5 per ct. Jan. 10)	
		Returned goods)	6629.73
		Net tax	331.48

(Testimony of Morris E. Mason.)

1921

Jan. 8	2	Frts. Allow.	9.09
Apr. 13	70	5 pr ct. May 10)	
		Returned goods)	53.83
		Net tax	2.69
Apr. 11	80	5 pr ct. May 10)	
		Correction)	2.72
Apr. 12	96	Frts. Allow.	6.07
May 12	115	Net June 10th)	
		Adjustments)	476.94
Sept. 12	271½	Frts. Allow.	117.50
Sept. 19	306	5 per ct. Oct. 10)	
		Returned goods)	84.16
		Net tax	4.20
Sept. 19	307	5 per ct. Oct. 10)	
		Returned goods)	206.56
		Net tax	10.32
Sept. 18	272½	Net Oct. 10)	
		Adjstm't allow.)	218.65
		Net tax	10.93
Sept. 19	344	Net Nov. 10)	
		Frts. Allow.)	164.18
Nov. 8	365	Frts. Allow.	9.98
Nov. 29	392	5 per ct. Dec. 10)	
		Returned goods)	1027.86
		Net tax	51.39
Dec. 28	429	5 per ct. Jan. 10)	
		Rebate)	106.37
		Net tax	5.31

1922

Mar. 15	231½	5 pr ct. Apr. 10)	
		Rebate)	274.32
		Net tax	13.72

(Testimony of Morris E. Mason.)

Mar. 15	24½	5 pr ct.	Apr. 10)	
		Rebate)	166.89
		Net tax	8.34
				<hr/> 10,207.91

Q. 13: Except for the payments of money and the allowances for credits referred to in the last two questions and answers, has the defendant made any other payments on the open account?

A. 13: No.

S. J. Bischoff: At this time, I wish to offer in evidence the three promissory notes referred to by the witness, the execution and delivery of which have been admitted in the pleadings.

Marked "Plaintiff's Exhibits C, D and E."

Plaintiff's Exhibit C

\$2633.36. Portland, Ore., Dec. 2, 1920.

May 10th, 1921, after date, without grace, we promise to pay to the order of Mohawk Rubber Co. of N. Y. at Portland, Oregon, Twenty Six Hundred Thirty Three and 36-100.....Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 6 per cent per annum from date until paid, for value received. Interest payable at maturity and in case suit or action is instituted to collect this note, or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due, May 10, 1921.

Munnell & Sherrill,
By E. J. Munnell.

(Testimony of Morris E. Mason.)

Plaintiff's Exhibit D

\$2633.36. Portland, Ore., Dec. 2, 1920.

April 10th after date, without grace we promise to pay to the order of Mohawk Rubber Co. of N. Y. at Portland, Oregon, Twenty Six Hundred Thirty Three and 36-100.....Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 6 per cent per annum from date until paid, for value received. Interest payable at maturity and in case suit or action is instituted to collect this note, or any portion thereof, promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due, April 10, 1921.

Munnell & Sherrill,
By E. J. Munnell.

Plaintiff's Exhibit E

\$2633.36. Portland, Ore., Dec. 2, 1920.

February 10th after date, without grace, we promise to pay to the order of Mohawk Rubber Co. of N. Y. at Portland, Oregon, Twenty Six Hundred Thirty Three and 36-100.....Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin at the rate of 6 per cent per annum from date until paid, for value received. Interest payable at maturity and in case suit or action is instituted to collect this note, or any portion thereof, promise to pay such addi-

(Testimony of Morris E. Mason.)

tional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

Due, February 10, 1921.

Munnell & Sherrill,

By E. J. Munnell.

Mr. Bischoff: May it be stipulated in the record that the incorporation of plaintiff is admitted and proof thereof will not be necessary?

Mr. Liljeqvist: Yes.

W. G. FITZGERALD, a witness called in behalf of the plaintiff, being first duly sworn testified as follows:

Direct Examination.

Questions by Mr. Bischoff:

State your full name.

A. William G. Fitzgerald.

Q. You were in the employ of the plaintiff?

A. Mohawk Rubber Company.

Q. What is your connection with the plaintiff?

A. Pacific Coast Manager.

Q. You are familiar, are you, with the account as it existed between Munnell & Sherrill and the plaintiff?

A. Yes, sir.

Q. I call your attention to the first three items of credits as shown on Plaintiff's Exhibit B, and will ask you whether those were taken into account or deducted from the amount due from Munnell

(Testimony of W. G. Fitzgerald.)

& Sherrill to the plaintiff when the notes offered in evidence were given?

A. Why these three items represent credits that they had received prior to the time the notes were given.

Q. That is, they are not—the accounts were settled between Mohawk Rubber Company and Munnell & Sherrill at that time?

A. Yes, sir.

Q. When the notes were given?

A. Yes, sir.

Q. And those three credits represent merchandise returned at that time, and as part of that settlement?

A. Yes, sir.

Q. The other credits that appear on this statement are proper credits against the open account that have accrued since then?

A. Yes, sir.

Cross Examination.

Questions by Mr. Liljeqvist:

You mean these three credits of December 4th and December 15th shown on Exhibit B, were credits which were given as part of the transaction at the time they made the notes?

A. Well, at the time these credits were given we didn't know that Munnell & Sherrill were to furnish us with any notes. That part had not come yet. There is one item there, six thousand dollars and

(Testimony of W. G. Fitzgerald.)

some odd cents, that represents a quantity of tires which were bought by Munnell & Shirrell for a certain purpose here in Portland, and after they were delivered, for some reason or other, Munnell & Sherrill couldn't carry out the transaction, and we allowed them to return those tires to us, that particular bunch.

Q. Wasn't that a part of the settlement you had at the time the notes were given?

A. No, sir, the fact of the matter is I personally had nothing to do with the notes at all; that was handled direct.

Q. Were the notes executed and given to you?

A. No.

Q. Mailed to you?

A. They were mailed to either our San Francisco branch or to Akron, I don't know which.

Q. When this settlement was made and these notes were given, was it made between Munnell & Sherrill and you personally?

A. No, sir, it was not.

Q. Done by correspondence—were you here?

A. Well I was on the coast, I don't know whether I was—

Q. I mean were you in Portland here? Were you here shortly before that time?

A. Yes.

Q. When was that?

(Testimony of W. G. Fitzgerald.)

A. Well I couldn't tell you just how long that was, but I presume maybe a month.

Q. What is that?

A. I presume it was a month prior to the time the notes were given.

Q. Now you were here some time between the 24th of November and the 2nd of December, when the notes were given, were you not?

A. Ask that question again, please.

Q. I say, you were here in Portland some time between the 24th of November and the 2nd of December when the notes were given, were you not?

A. I was here some time during the period you say, before the notes were given?

Q. Yes, between November 24th—

A. I was here—I was here before the notes were given. I don't know when the notes were given; I know I was here before the notes were given, because I am here every ninety days, so was bound to be here.

Q. Did you arrange for the notes originally?

A. No, sir, I did not.

Q. You did not arrange for them?

A. No, sir.

Q. Who were they dealing with in that?

A. On these particular notes Munnell & Sherrill dealt direct with our credit department at Akron, Ohio.

(Testimony of W. G. Fitzgerald.)

Q. The agreement was not made with you at all then?

A. No, sir.

Q. Was there any agreement made between you and them that they should give you these notes and return tires to you, in settlement of the account?

A. No.

Q. Have you any letter in your possession where the factory at Akron wrote you, a letter that was dated November 19, 1920. You have that letter here?

A. Pertaining to what?

Q. This transaction.

A. I don't know whether Mr. Bischoff has a letter of that character or not.

Mr. LILJEQVIST: Have you a letter of November 19, 1920, from the Mohawk Factory, at Akron, to Mr. Fitzgerald?

A. No, there is no letter of the 19th from the Mohawk Company.

Q. As a matter of fact then, do I understand you to say that this entire settlement, the shipment of the tires back to the factory and the giving of these promissory notes that are described in the complaint here, was made entirely by the Akron Factory?

A. No. As far as the notes were concerned, they were made by our credit department and Munnell & Sherrill. These notes were sent direct to

(Testimony of W. G. Fitzgerald.)

Akron, but the tires were shipped to us at San Francisco.

Q. And they were not a part of the same agreement?

A. No.

Q. How did they happen to ship these tires to San Francisco and what was the agreement with reference to it?

A. That item there of \$6000, to the best of my knowledge, represents quantity of 32x4 Cord tires, which was a very popular tire at that time, popular size, and still is. When these tires were shipped to Munnell & Sherrill, as I said a few minutes ago, for some reason or other they were unable to resell them to the party who had agreed to buy them from them. If I am not mistaken, I think it was on account of Munnell & Shirrell afterwards finding out that this concern was weak financially; so, being 32x4 tires, and a popular seller, I allowed them to return these particular tires to our San Francisco branch, because we could very easily get rid of them ourselves.

Q. Now you had authority from the factory to take these tires back, didn't you?

A. Yes, sir.

Q. Did you get authority from the factory in reference to this transaction?

A. On this particular transaction of \$6000.

Q. Yes,

A. Yes, sir.

(Testimony of W. G. Fitzgerald.)

Q. It wasn't necessary, was it?

A. Yes, sir.

Q. Wherein was it necessary?

A. Because I hadn't authority to allow anybody to return goods.

Q. You haven't any authority?

A. No, my authority is limited, simply selling; that is my authority, to sell goods.

Q. You are the Pacific Coast Manager?

A. I am.

Q. You handle the entire Pacific Coast on behalf of the Mohawk Rubber Company?

A. The selling end.

Q. What states do you have under your jurisdiction?

A. I have Utah, California, Oregon, Washington, Montana and Arizona.

Q. Is your authority in writing?

A. No.

Q. So the scope of your authority is not in writing?

A. No.

Q. Now as a matter of fact, you took back tires repeatedly from this company, didn't you?

A. I did what?

Q. Took back tires repeatedly from this company, didn't you?

A. From Munnell & Sherrill?

Q. Yes.

(Testimony of W. G. Fitzgerald.)

Q. I hand you a telegram and will ask you to look at it and state if this is not a telegram when you were up here to Portland between the time I asked you, when you said you were not here, that you accidentally left with Munnell & Sherrill?

A. Well I presume this applied to that \$6000 item that we have just been talking about.

Q. Then you did get that telegram from the office at Akron, didn't you?

A. Well I presume I did, it seems to be authentic.

Q. And pursuant to that telegram you and Munnell & Sherrill entered into an agreement for the return of these tires, and also for the giving of these notes, didn't you?

A. I presume that at the time we talked about the return of these tires, also there was some talk about settlement of their account, and that telegram applied to these notes, and also to these tires—that particular bunch of tires. Now I presume that in my wire to Akron, if I did wire—I don't know—is that in reply to a wire?

Q. To your letter.

A. Reply to letter. I presume I mentioned to the company what Munnell & Sherrill were willing to do.

Q. Then as a matter of fact they did make this agreement with you in reference not only to the

(Testimony of W. G. Fitzgerald.)

return of the tires, but the execution of the notes, didn't they?

A. No, they didn't make it with me; that telegram there shows they didn't make it with me.

Q. Isn't it true if you hadn't entered into that agreement for the execution of these notes and the return of the tires, that at that time they intended to and would have, under agreement with you, returned their entire stock of tires to you at San Francisco?

A. What I meant by I had nothing to do with the notes, is this: the notes were issued by Munnell & Sherrill and sent to our factory at Akron, Ohio, and they were not handed or turned over to me.

Q. I will ask you to look at letter of December 2, 1920, which I just received from your attorney, from your own files, and ask you if that is not a letter sent to you at San Francisco by Munnell & Sherrill?

A. Yes, sir, it is.

Q. That letter shows the notes were sent to you in spite of what you say on the witness stand. Isn't that true?

A. They were sent to our San Francisco branch, but if you remember I told you previously I wasn't sure whether they were sent to San Francisco or Akron, but anyway they found back to Akron; were not turned over to me personally.

Q. They went to your San Francisco office?

(Testimony of W. G. Fitzgerald.)

You admit that now, don't you, after refreshing your mind from that letter?

A. That letter states they were sent there.

Q. They were sent to you pursuant to a settlement you had there?

A. No, were not sent to me.

Q. You were here on the 24th of November, 1920?

A. I don't know, I couldn't tell you that without looking up the record.

Q. Look at your telegram. Your telegram shows that does it not?

A. I didn't notice the date of it. I presume I was.

Q. So then you were here shortly before the first of December when these notes were signed, weren't you? If this telegram is correct.

A. I presume so from that telegram.

Telegram and letter marked "Defendant's Exhibits 1 and 2" for identification.

Defendant's Exhibit 1

Akron, O Nov. 24, 1920

W. G. Fitzgerald

Hotel Benson, Portland, Oregon.

Munnell and Sherrill make a complete settlement along lines your letters 19th have all tires returned San Francisco branch get notes for balance including interest since due seven per cent.

Mohawk Rubber Company.

(Testimony of W. G. Fitzgerald.)

Witness excused.

Plaintiff rests.

Mr. LILJEQVIST: For the purpose of the record I move the Court for an order directing the jury to return a verdict in favor of the defendant.

COURT: Do you rest your case?

Mr. LILJEQVIST: No, your Honor.

ARTHUR J. SHERRILL, one of the defendants, called in his own behalf, being first duly sworn testified as follows:

Direct Examination.

Questions by Mr. Liljeqvist:

State your name, residence and occupation?

A. Arthur J. Sherrill, residence Portland, partner in Munnell & Sherrill.

Q. You are one of the defendants in this case, are you?

A. I am.

Q. Mr. Sherrill, I hand you three promissory notes which have been offered in evidence by the plaintiff herein, marked Plaintiff's Exhibits C, D and E, and will ask you to look at them and state whether you recognize the notes.

A. Those notes do not bear my signature, they are signed by Mr. Munnell.

Q. You know his handwriting?

A. Yes.

Q. Now Mr. Sherrill, I want you to tell the jury the circumstances under which these notes were

(Testimony of Arthur J. Sherrill.)

executed, and what agreement you had, if any, with the Mohawk Rubber Company, at that time, with reference to the account and return of tires.

A. Do you want what happened at this particular time?

Q. Yes at this time, along about—

A. At the time this agreement was made?

Q. Yes, along about the time these notes were executed.

A. Well we were overstocked on tires and had made arrangements to return tires to the factory branch at San Francisco.

Mr. BISCHOFF: That is objected to as incompetent, irrelevant, immaterial and not responsive. He is testifying to a conclusion—that he made an agreement; no evidence of any agreement.

COURT: State what happened.

Mr. BISCHOFF: State with whom you had the conversation so the Court can determine whether there was an agreement or not.

A. We had made an arrangement with Mr. Fitzgerald to return stock to San Francisco, to take care of our debts, as we were overstocked, and along in the fall Mr. Fitzgerald came to Portland and took the matter up with us about retaining these tires, telling us that in all probability we would need that stock in the spring.

Q. Let me interrupt you right at that point. You say he took up with you the question of retain-

(Testimony of Arthur J. Sherrill.)

ing that stock. Will you tell the jury whether prior to that time you ever had any understanding or agreement with Mr. Fitzgerald with reference to the return of stocks that you had, and if so when you had that conversation with him, where it was, and what was said.

Mr. BISCHOFF: I object to the question as again calling for a conclusion. He is asking him to state what was the agreement had with Mr. Fitzgerald, and we object further on the ground there is not evidence of any authority on the part of Mr. Fitzgerald to make an agreement with this witness.

COURT: The evidence shows Mr. Fitzgerald was the Pacific Coast Manager of this firm, and as it was selling and dealing in tires, I think we will assume, until the contrary is shown, that he had authority commensurate with the position he holds.

Mr. BISCHOFF: The testimony is he had authority to sell, and that was the limit of his authority.

COURT: We may be able to find out before we get through.

Mr. BISCHOFF: Save an exception. The witness should be required to state the conversation, and not his conclusion.

COURT: What conversation you had with Mr. Fitzgerald about the return of the tires.

A. Well we had various conversations quite naturally. I was in San Francisco that summer,

(Testimony of Arthur J. Sherrill.)

and I took the matter up. Then he came to Portland and we took it up further, and we—first we were of the opinion that we should return sufficient tires to liquidate the indebtedness to the Mohawk Rubber Company, then we talked it all over as we naturally would—

COURT: What did you say?

A. Mr. Fitzgerald—

COURT: What did you say? What did he say?

A. Mr. Fitzgerald said that no doubt we would need these tires in the spring. If we returned them to San Francisco we will have to go to the expense of sending them down there and bringing them back to Portland to use in our business in Portland the following year. So he—we decided in talking it over together—that the better way would be for us to leave these tires in Portland, and so to make an entirely new deal—we were to give him certain notes, or divide them up as I recall it, in five different notes, and we were to retain the tires in Portland, with the exception of something like \$6000 worth of tires which were to be shipped to San Francisco. That was the matter—the way the matter stood when Mr. Fitzgerald left Portland. It was with the understanding that we were to execute these notes and send them to him and ship the tires to him, and retain the rest of the tires after we had shipped the \$6000 worth to San Francisco.

(Testimony of Arthur J. Sherrill.)

Q. Then these tires, the tires you shipped to San Francisco after having had that conversation with Mr. Fitzgerald, are they the tires that are referred to in this letter which was shown here a short time ago, and which has been marked for identification Defendants' Exhibit 2?

A. I presume—Mr. Munnell signed this letter; I presume that —

Q. That is Mr. Munnell's signature?

A. That is Mr. Munnell's signature.

Q. That list attached to that letter, is that a list of the tires which were returned to San Francisco?

A. To the best of my knowledge, it is.

Q. I will connect this up with other witnesses. Now Mr. Sherrill will you tell the jury what conversation you had with Mr. Fitzgerald at that time with reference to this stock that you kept here and didn't ship back to San Francisco—what should be done with it, how it should be handled, upon what terms, and just state what the conversation was.

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial. It appears here that they made a settlement by which he was to return certain tires, and he did return them, and was to pay for the balance by means of these notes, which was done. What other arrangements they had with respect to the tires which were kept, I can't see how it would be material here.

(Testimony of Arthur J. Sherrill.)

COURT: Some defense on the other tires.

Mr. BISCHOFF: That was on tires later acquired.

Mr. LILJEQVIST: They are attempting to show part of the agreement, we expect to show the whole of that agreement. They called Mr. Fitzgerald, he testified to certain tires going back to San Francisco. Presumably there was some arrangements at that time. Now we simply expect and offer to show the whole of that arrangement. And furthermore, in reference to his authority in reference to that, he had authority to take back part of these tires, and to take the notes. They accepted \$6000 worth of tires, they accepted our notes. We claim under the facts and circumstances before we get through, they necessarily ratified the rest of this agreement, if he should claim he didn't have authority to make further agreement.

COURT: Are you making a claim of setoff or counter claim for part of the tires retained?

Mr. LILJEQVIST: Rebate we are entitled to in what happened in the future with reference to price reductions in reference to these tires and other tires on hand and left in our custody at the time these notes were executed.

Mr. BISCHOFF: They allege in their own pleadings that this December arrangement in giving the notes, was an absolute settlement between the parties by which they had a right to return some tires

(Testimony of Arthur J. Sherrill.)

and pay for the rest of the indebtedness by means of these notes. We don't question that in the least. The only reason I put Mr. Fitzgerald on the stand was to settle definitely that these credits represented tires he returned, and notes given for the balance of the purchase money. All the rest of the controversy arises out of tires that were bought thereafter, and payment of these notes. And here is their allegation with respect to that transaction:

"That on or about the.....day of November, 1920 a settlement of the account of plaintiff with the defendants was made by the parties thereto, and it was agreed between the plaintiff and defendants that instead of shipping tires back to the Mohawk Rubber Company at San Francisco, said defendants should keep all of said tires on hand under a regular spring dating agreement wherein and whereby they were to pay for said tires during certain months of the spring of 1921, towit, the months of....., and the said Mohawk Rubber Company did accept and receive in full settlement of the old account of these defendants, their certain five promissory notes, two of which have been paid, and the remaining three are the same notes set out in plaintiff's first, second and third cause of action, it being understood between the parties plaintiff and defendant that a new agreement and arrangement was being entered into."

(Testimony of Arthur J. Sherrill.)

COURT: What I am trying to find out is whether or not the defendant is claiming anything in this case because of the tires retained by the company at that time?

Mr. LILJEQVIST: Claiming two things. We are claiming these tires which we kept have been paid for—we paid for them. They claim we have not paid for them.

Mr. BISCHOFF: We claim they did pay by giving these notes.

Mr. LILJEQVIST: We gave the notes, but we plead that instead of shipping the tires back to San Francisco we kept certain of them and gave certain promissory notes due in the spring. At that time we had a spring dating agreement under the terms of which if there was a cut in price, whatever that rebate would be, we would get the benefit of it; and we are expecting to offer evidence to show we are entitled to that rebate.

COURT: You claim rebate on those tires you retained.

Mr. LILJEQVIST: Yes, and desire to show the agreement.

Mr. BISCHOFF: His pleadings would not permit that, because he alleges absolute settlement of the account, and does not allege any modification of the agreement.

Objection overruled, exception saved.

A. The matter of rebate or price protection came

(Testimony of Arthur J. Sherrill.)

up at this time when we had this matter up with Mr. Fitzgerald, and I said to him, I said, "Well Bill if we keep these tires and go out and take spring dating orders, what protection will we have?" And he said, "You will have the same—the usual protection on spring dating orders, of course."

COURT: What kind of orders?

A. Spring dating.

Q. Explain that to the jury, what that means.

A. A spring dating order is an order that is taken in the fall or late winter, and enables the country merchant to buy his tires, have them delivered to him some time in December or January, and he pays for them in March, April or May, or April, May and June; there are different terms, but it is a dating order, and he is protected against price decline up to the period of his last dating month. For example, if he paid for his tires in May, he would be protected against price decline until May 10th, whatever the price may be. In other words, he is not taking any chances on the price of tires dropping and having to bear the decline. And in doing business as distributors we give our dealers that protection. We couldn't compete against factories unless we did, and we are supposed to be in the same relative position as a factory branch, giving our country dealers the same protection that a factory branch would give them, and the same terms and prices. That was the con-

(Testimony of Arthur J. Sherrill.)

versation that came up when the settlement was made, and we were assured by Mr. Fitzgerald that naturally—to use his own words—naturally if you are going to sell tires to the dealers you must be protected.

MR. BISCHOFF: I move to strike as not responsive and not binding on the plaintiff as to what practice he followed or understanding he had with his own customers, and on the ground that there is no evidence of any authority on the part of Mr. Fitzgerald to bind the plaintiff by any price reduction.

COURT: If your company has a General Manager in San Francisco, a Coast Manager, and sends him out through the country to deal with people selling goods, I think the dealer has a right to assume he has authority to do what he is doing, until the contrary is shown. I don't think a man in Portland who deals with a San Francisco manager or branch of an Eastern house, a man who is the Pacific Coast Manager, is chargeable with knowledge of any limitation that his people put upon him.

MR. BISCHOFF: This gentleman has been testifying about an understanding he had with his own customers, and went into a long detailed account of the arrangement which he had, which couldn't possible be binding upon the plaintiff.

COURT: Testifying as to what occurred between him and Mr. Fitzgerald, as I understand it.

(Testimony of Arthur J. Sherrill.)

Exception saved.

Q. Lets get this in another form. Do I understand you then, at the time you gave these notes, that instead of shipping the tires back to Mr. Fitzgerald in San Francisco, and not having to give any note, you gave the notes and had this understanding with him with reference to spring dating order? Am I correct in that, or not?

A. Absolutely.

Q. Then the tires you kept, state to the jury whether or not you had an agreement with Mr. Fitzgerald that you could go out and sell these to your dealers on spring dating terms, so that in case a price cut came the following spring, your dealers would get the benefit of that price cut, as well as yourself?

Mr. BISCHOFF: Objected to as calling for a conclusion, argumentative and leading.

Objection overruled and exception saved.

A. We had that agreement.

Q. Will you tell the jury whether or not during the spring, within the time of the spring dating term, as you had that agreement with Mr. Fitzgerald, whether the company did cut the price on tires?

A. They did.

Q. And you got a letter in writing to show that they did cut that price?

(Testimony of Arthur J. Sherrill.)

A. I believe you will find corespondence there on the matter.

Q. I hand you herewith two letters of May 10th, one a circular letter with list attached to it, and also another letter from Mason. Tell the jury whether or not Munnell & Sherrill, the defendants in this case, received that letter or these letters from the plaintiff the Mohawk Rubber Company, through the mails?

A. They did.

Q. And that came to you in due course of mail?

A. That did.

Q. Have you had frequent correspondence with Mason in reference to your busines transactions?

A. At different times, yes sir.

Q. When you wrote to the factory would you get letters back from the factory signed by Mason, this man?

A. Yes.

Q. Did you ever personally meet him?

A. No, sir.

Q. Mr. Munnell met him, I understand, didn't he?

A. I believe he did, yes.

Q. Did you act in your business, or take as true and act with reference to your business transactions upon the letters signed by the Mohawk Rubber Company through this man Mason?

A. I didn't get that.

(Testimony of Arthur J. Sherrill.)

Q. In other words, did you act upon the letters purporting that they were genuine letters from the Mohawk Rubber Company, when they came through the mails and were signed by Mason?

A. We did.

Q. Is this one of them?

A. Yes, sir.

Mr. LILJEQVIST: We submit to counsel and offer in evidence.

Mr. BISCHOFF: We object to the admission in evidence of the letters offered, on the ground they are incompetent, irrelevant and immaterial, in that the pleadings disclose, and the evidence thus far discloses that at the end of November the parties had an absolute settlement of all their accounts for all purposes, and on the further ground that there is no evidence of any understanding or agreement or custom which would entitle the defendants to any rebate on tires, on all stock on hand on May 10th, the time when these letters were written.

Objection overruled; exception saved.

Marked "Defendants' Exhibit No. 3" and read.

Defendants' Exhibit No. 3

Akron, Ohio, May 10, 1921.

Munnell & Sherrill,

40 1st St., Portland, Ore.

Gentlemen:

We enclose herewith temporary new list. Printed lists will be ready within a day or two.

These prices are based on the U. S. List with approximately 15 per cent added up to 4-inch sizes, and above 4-inch 10 per cent. On cord casings we have used U. S. list with approximately 10 per cent added. On Tubes we have cut our old list 20 per cent. Ribbed fabric casings are now 5 per cent below non-skid, and ribbed cord casings $2\frac{1}{2}$ per cent below. There is no change on truck sizes.

We shall have a printed dealer's list figured at 25 per cent off this consumer's list, which will bring the dealer's net cost about 10 per cent above standard cost on casings which take 15 per cent advance and 5 per cent above on those which take 10 per cent advance. Prices will be adjusted back to May 2nd, and price guarantee will cover goods on hand and unsold, bought during March and April, also unsold portion of dating orders.

Yours very truly,

The Mohawk Rubber Company.

M. E. Mason,

Sales Manager.

P. S.—Your discount will be 25-15 off consumer's, subject to the usual cash discount, and tax added.

Defendants' Exhibit No. 3

Akron, Ohio, May 10. 1921.

TO OUR CUSTOMERS

We enclose new consumer's and dealer's lists on Mohawk Quality Tires, dated May 10, 1921. Tires which we have shipped since May 2nd will be reconciled to these prices.

Kindly note that the differential between the so-called standard consumer's list and the Mohawk consumer's list has been shortened and from now on there should be no necessity cutting consumer's prices. For this slight additional cost the consumer gets one of the very few really high grade tires and all the benefits arising from compounds without shoddy, high grade fabrics, extra plies of fabric, checkerboard fabric, hard construction, pure gum cushion and friction. Don't you believe these will produce far more than 600 to 900 additional miles on fabrics and 800 additional miles on cords over the ordinary time? That is all the buyer requires to make his purchases as economical. We know he will get far more than this.

In lowering our consumer's list we have removed sales resistance, but at the same time we have maintained for you a better than average profit and shall continue to make exclusive arrangements with dealers who will produce a volume of business.

Your actual costs will approximate very closely the costs on merchandise of cheaper quality, and you get fresh clean stock, not tires one to three years old. Our quality is maintained.

Our price protection is on goods bought during March and April at regular prices and which are on hand and unsold on May 2nd. Goods bought on dating which are on hand and unsold on May 2nd may be included. Inventories by sizes and includ-

ing serials must be submitted, and merchandise credits will be issued as rapidly as possible.

Send in your orders.

Yours very truly,

The Mohawk Rubber Company,

M. E. Mason,

Sales Manager.

May 10, 1921.

MOHAWK FABRIC CASINGS

and

RED AND GRAY TUBES

	Nonskid	Ribbed	Tubes
28 x 3.....	16.50	15.70	2.50
30 x 3.....	17.00	16.15	2.65
30 x 3½.....	21.00	19.95	3.35
30 x 3½ Combination			2.80
31 x 3½.....	23.00	21.85	3.55
32 x 3½.....	26.00	24.70	3.60
34 x 3½.....	28.00	26.60	3.90
31 x 4.....	30.00	28.50	4.20
32 x 4.....	33.00	31.35	4.35
33 x 4.....	34.50	32.75	4.50
34 x 4.....	36.00	34.20	4.65
35 x 4.....	38.00	36.10	4.85
36 x 4.....	40.00	38.00	5.00
32 x 4½.....	41.20	39.15	5.45
33 x 4½.....	43.00	40.85	5.65
34 x 4½.....	44.20	41.99	5.75
35 x 4½.....	46.00	43.70	5.90
36 x 4½.....	47.00	44.65	6.10

(Testimony of Arthur J. Sherrill.)

37 x 4½.....	49.00	46.55	6.40
33 x 5.....			6.50
34 x 5.....			6.70
35 x 5.....	54.00	51.30	6.85
36 x 5.....	57.10	54.25	7.20
37 x 5.....	58.00	55.10	7.35
36 x 5½.....	64.20		8.25
37 x 5½.....	68.00		8.50
38 x 5½.....	70.00		8.75

May 10th, 1921.

MOHAWK CORD TIRES

	Nonskid	Ribbed
30 x 3½.....	32.00	31.20
32 x 3½.....	40.00	39.00
32 x 4.....	51.50	50.20
33 x 4.....	52.50	51.20
34 x 4.....	53.50	52.15
32 x 4½.....	58.20	56.75
33 x 4½.....	59.00	57.50
34 x 4½.....	60.00	58.50
35 x 4½.....	62.80	61.25
36 x 4½.....	64.10	62.50
33 x 5.....	72.50	70.70
35 x 5.....	75.00	73.15
37 x 5.....	80.00	78.00
36 x 6.....	125.00	
38 x 7.....	175.00	
40 x 8.....	222.00	

Q. This list attached to it, what is that, is that

(Testimony of Arthur J. Sherrill.)

a list of the new prices?

A. I presume it is.

Q. Not material to us, as far as that is concerned. Now, handing you that letter, it might not be as clear to persons not familiar with tires, as it may be to you. Will you tell whether or not that letter did constitute a cut in prices of Mohawk tires as they were then?

Mr. BISCHOFF: Objected to as calling for a conclusion. The effect of that is for the Court.

COURT: You might ask him what the prices were before that.

Exception saved.

A. That is a cut, yes sir, a reduction.

Q. This in his letter about the quality being maintained, what is the fact about that?

Mr. BISCHOFF: Objected to; no issue raised in the pleadings about any defect in the quality.

Mr. LILJEQVIST: It may become material later on.

COURT: Nothing in the pleadings about the quality of the tires.

Q. Now Mr. Sherrill, with reference to the cut, you testified about an understanding at the time of the notes with reference to getting rebate if there was one. This letter has been offered. Now will you tell the jury whether or not you and your partner had any other—had any oral talk in addition to these at any subsequent time, with Mr. Fitzgerald,

(Testimony of Arthur J. Sherrill.)

with reference to what he or you would get by reason of the cut indicated in that letter, or any cut, and if so, state whether it was to apply upon any particular indebtedness which plaintiff alleges in this complaint.

MR. BISCHOFF: Objected to on the ground it now appears their arrangement with respect to the decline in prices is contained in writing and the testimony of a party to the contrary would be incompetent.

COURT: That may be only part of the transaction; that is a letter from the company, not a formal agreement.

Exception saved.

A. When the tires declined the following spring, the office sent a list to San Francisco of the tires on hand.

JUROR: Your office?

A. Our office sent a list, as I recall it. I believe they sent all the tires. I am not the office man, I am the outside man, so I am not familiar with it, not certain about the number of tires sent.

Q. I hand you herewith a carbon copy of a letter of May 27, 1921 (To Mr. Bischoff). If you have the original I wish you would produce it—and ask you if that is the list you just referred to?

A. I presume that is the list.

Q. Do you know who dictated the letter that accompanied the list? Did you do it?

A. No, I did not. That would be Mr. Munnell or Mr. Auspach.

Q. Then all you know about list going down is what you know from being associated in the office with these gentlemen?

A. Yes. I know at the time we sent them a list—

Q. You know he sent you a list, you mean?

A. No, I know at the time we sent the list because we received a letter later on from Mr. Fitzgerald, stating that in his opinion—

COURT: Just moment; the letter is the best evidence.

Q. You don't need to tell what the letter states. You got a letter from them?

A. Yes, sir.

Mr. LILJEQVIST: All right. We offer a letter of May 27th, sent by Munnell & Sherrill to the Mohawk Rubber Company, and by agreement substitute copy.

Marked "Defendants' Exhibit 4."

Defendants' Exhibit No. 4

May 27, 1921.

Mohawk Rubber Co.,

San Francisco, Cal.

Gentlemen:

We are enclosing list of Mohawk casings and tubes on hand May 14th at which time inventory was taken.

We have been delayed in sending this list in

(Testimony of Arthur J. Sherrill.)

owing to stress of detail work during the past ten days which has occupied all of the writer's time.

Yours very truly,

Munnell & Sherrill.

By H A A

Inventory of Tires on hand May 14th, 1921.

2 28x3 N S Fabs
39 30x3 Rib Cl
9 30x3 N S Cl
53 30x3½ Rib Cl
114 30x3½ N S Cl
4 31x3½ N S Cl
41 32x3½ Rib SS
50 32x3½ N S SS
6 34x3½ N S SS
18 31x4 Rib Cl
33 31x4 N S Cl
23 32x4 Rib SS
23 32x4 N S SS
29 33x4 Rib SS
15 33x4 N S SS
25 34x4 Rib SS
23 34x4 N S SS
7 35x4 N S SS
6 36x4 N S SS
9 32x4½ N S SS
5 33x4½ N S SS
2 34x4½ Rib SS
8 34x4½ N S SS

(Testimony of Arthur J. Sherrill.)

- 7 35x41½ Rib SS
- 13 35x41½ N S SS
- 3 36x41½ N S SS
- 4 36x41½ N S SS
- 2 35x5 N S SS
- 1 37x5 Rib SS
- 1 37x5 N S SS
- 22 30x31½ N S Cl Cords
- 32 32x31½ Rib SS Cords
- 39 32x31½ N S SS “
- 20 32x4 Rib SS “
- 17 32x4 N S SS “
- 20 33x4 Rib SS “
- 27 33x4 N S SS “
- 18 34x4 Rib SS “
- 9 34x4 N S SS “
- 2 32x41½ Rib SS “
- 4 32x41½ N S SS “
- 6 33x41½ Rib SS “
- 6 33x41½ N S SS “
- 5 34x41½ Rib SS Cords
- 13 34x41½ N S SS “
- 10 35x41½ Rib SS “
- 21 35x41½ N S SS “
- 3 36x41½ Rib SS “
- 4 36x41½ N S SS “
- 1 33x5 Rib SS “
- 6 33x5 N S SS “
- 3 35x5 Rib SS “

(Testimony of Arthur J. Sherrill.)

6	35x5	N S SS	“
1	37x5	Rib SS	“
3	37x5	N S SS	“
6	28x3	Red Tubes	
153	30x3	“	“
247	Comb.	Tubes	
196	30x3½	Red Tubes	
5	31x3½	“	“
26	32x3½	“	“
6	34x3½	“	“
21	31x4	“	“
26	32x4	“	“
9	33x4	“	“
26	34x4	“	“
11	35x4	“	“
12	36x4	“	“
9	32x4½	“	“
9	33x4½	“	“
13	34x4½	“	“
16	35x4½	“	“
9	36x4½	“	“
5	37x4½	“	“
7	35x5	“	“
22	35x5	“	“
9	37x5	“	“

Q. Then this list which is offered in evidence—after sending that list on May 27th, you got this letter of June 2nd, did you?

A. Yes, sir.

(Testimony of Arthur J. Sherrill.)

Mr. LILJEQVIST: From Mr. Fitzgerald. We offer it in evidence.

Mr. BISCHOFF: I didn't hear you offer in evidence letter marked Defendants' Exhibit 4. I want to note my objection on the ground the pleadings do not permit the recovery of any rebates for decline in prices on any merchandise they had on hand prior to the settlement made in December, evidenced by notes or returned merchandise. The same general objection I have made right along.

Objection overruled, exception saved.

, Mr. BISCHOFF: No objection to letter of June 2nd.

Marked "Defendants' Exhibit 5."

Defendants Exhibit No. 5

San Francisco, Cal., June 2, 1921.

Munnell and Sherrill Co.

Portland, Oregon.

Gentlemen:

This will acknowledge your letter of the 27th ulto., enclosing list of tires and tubes which you state were on hand the 14th ulto.

We presume you sent us the list to assist us in figuring out just what stock is entitled to a rebate, in accordance to manufacturers agreements covering such matters. However, you do not mention the serial numbers pertaining to the tires and therefore it will be impossible for us to determine whether you have any rebate coming.

(Testimony of Arthur J. Sherrill.)

In looking over the list and noting various sizes, quantities and etc., we presume that you must have listed every tire you and your dealers have in stock and of course you understand that we cannot rebate on stock regardless of the date it was purchased, there has to be a limit to the protection of distributors on price, otherwise the manufacturer would not stay in business very long.

Send us immediately the serials covering stock mentioned on the list and we will trace them back and find out when shipment was made and those that come within the time limit will be referred to our invoice department and a credit issued for the differential.

Yours very truly,

Mohawk Rubber Co. Inc.

S. F. Branch.

By W. G. Fitzgerald,

Pacific Coast Mgr.

Mr. LILJEQVIST: In answer to the letter of the 2nd, I hand you carbon copy and will ask you to produce the original.

Mr. BISCHOFF: If you have the carbon you can offer that.

Q. I hand you carbon copy of letter and ask you if you wrote this?

A. That is a letter I wrote.

Mr. LILJEQVIST: We offer carbon copy which was written at the same time.

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: We don't object on the ground it is a carbon, but we object on the ground we have been objecting all along, there can be no recovery or credits for merchandise they had on hand covered by the settlement.

Objection overruled, exception saved.

Marked "Defendants' Exhibit 6."

Exhibits 4, 5 and 6 read.

Defendants' Exhibit No. 6

June 4, 1921.

Mohawk Rubber Co.,
San Francisco, Cal.

Attention Mr. Fitzgerald.

My Dear Fitz:

Replying to yours of June 2d, will say that the list we sent you was stock on hand and that sold on spring dating.

The only agreement we know anything of is the one we made with you when we signed the notes last fall and which was to the effect that we were to be protected against decline. Quite naturally, we would have returned the stock to you at that time if we were not to receive protection, as it would be out of the question for us to go out and solicit spring dating orders without giving the dealers that protection which would be impossible for us to do unless we received it from you. We believe we are entitled to a rebate on the list as it stands.

(Testimony of Arthur J. Sherrill.)

Business is picking up somewhat but is still nothing to brag about. Of course, you know that Kelley's new price is quite a bit under us on Cords and they are certainly making the most of it in this territory.

We expect to take care of the note due June 10th and certainly hope that we can make the remaining payments when due.

Yours very truly,

Munnell & Sherrill.

Q. Now Mr. Sherrill, with reference to that answer of Mr. Fitzgerald, and your response to him, will you state whether or not you took up subsequently with Mr. Fitzgerald, when he came to Portland, this same matter of the rebates which you claimed at that time?

A. We did.

Q. Now, did you have a conversation with him?

A. Yes, sir.

Q. Where did that conversation take place?

A. In the office.

Q. Whose office?

A. In our office.

Q. Who were present?

A. Mr. Munnell and Mr. Auspach were in the office at the time, I believe.

Q. And who?

A. Mr. Auspach.

Q. You were there?

(Testimony of Arthur J. Sherrill.)

A. Yes, sir.

Q. Then besides yourself, there was Mr. Munnell and Mr. Auspach, I understand?

A. Yes, sir.

Q. And Mr. Fitzgerald?

A. Yes, sir.

Q. Now tell the jury that conversation.

Mr. BISCHOFF: When was that?

Q. All right; when was it, to the best of your recollection?

A. That must have been some time in June, I don't recall the exact date, but I think you have a letter there from Mr. Fitzgerald saying that he will be in Portland.

Q. Here is a letter dated June 18th stating he will arrive in Portland Thursday morning, Is that the trip?

A. I imagine that was it.

Q. Then it was the trip that he made when he wrote you this letter?

A. Yes.

Q. And if in that letter, this letter of June 18, 1921, he stated he would be in the next Thursday morning, it would be the 23rd of June this conference took place?

A. Sometime about that time.

Q. Now, tell the jury what the conversation was between yourself and Mr. Fitzgerald at that time. in the presence of these witnesses.

A. Well Mr. Fitzgerald came up—

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: We make the same objection to that testimony as we have heretofore made.

Objection overruled, exception saved.

A. Mr. Fitzgerald came up to Portland and we talked over different things, and finally discussed the proposition of our rebate, and finally he said, well, he said, "This matter is in such a condition here," he says, "that it is going to be awfully hard to take this stock and figure out just exactly what your correct rebate would be." He says, "The tires have been purchased at different times, and there was a fall dating"—the notes we gave him in the fall with the spring dating order, and the tires that we had purchased since then, and he felt that it would be a pretty hard question to figure out the actual amount that we were entitled to on rebate, and he also felt that we were not entitled to a rebate on our entire stock, and we agreed with him on that, that possibly it would be better to make a sort of compromise. So he suggested that inasmuch as there were five notes, that we would consider one of these notes as the amount of the rebate, and stated that he would go to San Francisco and issue us credit for that amount.

COURT: Issue what?

A. Give us credit; he would give us credit for that amount.

COURT: For one of the notes?

A. For one of the notes.

(Testimony of Arthur J. Sherrill.)

Q. As a matter of fact, the way you figured it out on the tires, as to the amount of rebate as shown, as you have testified the agreement was, was the amount of your rebate in excess of these notes—the amount of one of these notes?

A. It would have been if we had rebated on the entire stock, as we originally sent the list to San Francisco.

Q. Your rebate would really have been—

A. Would have been in excess of the amount as we finally determined upon.

Q. When you got through. You finally, after dickering back and forth—

A. We agreed to a smaller amount.

Q. And what agreement did he have with you with reference to how the note would be taken care of?

Mr. BISCHOFF: Just a moment. It is apparent counsel is attempting to establish sort of an account stated with respect to that rebate item, or coming to an agreement as to the amount of the indebtedness and promise to pay it, or give credit for it, which is the same thing, and if that is the purpose of it, we object to it, on the ground that there is no evidence in the record of any authority on the part of Mr. Fitzgerald to compromise any claim for the plaintiff, or to issue credit therefor, or to bind them by an agreement to release the payment of any notes.

(Testimony of Arthur J. Sherrill.)

Objection overruled, exception saved.

A. At that particular time there was no mention made of any particular note, but at a subsequent visit to Portland Mr. Fitzgerald told us to hold the last note. We had taken the matter up with him as to credits which had not come through. After he had returned to San Francisco we didn't get our credits for these—credit for this amount, so when we took it up with him the second time when he came to Portland, which was possibly a month later, Mr. Fitzgerald said, "Well just pay—just hold out the last note. When you have come to the last note, why just hold that out, that will take care of the rebate."

Q. Not this agreement that he had with you in June, in which you adjusted the rebate that you were entitled to, in the manner you testified, will you tell the jury whether, when he got back to San Francisco, he performed his agreement and issued you this credit memorandum that he told you he would send you?

Mr. BISCHOFF Same objection.

A. He did not.

Q. He did not. Then later on when he came back here you had a conversation again with him in reference to that?

A. Yes, sir.

Q. And then he told you what?

A. That we were to take the last note; to pay

(Testimony of Arthur J. Sherrill.)

the four notes, and to take the last note as our rebate.

Q. You might tell the jury, Mr. Sherrill, what the fact is with reference to whether his promises to you when he was on the ground, orally, and what he was to put in writing, was adopted by correspondence. What is the fact?

Mr. BISCHOFF: That is objected to.

COURT: Not a general statement.

Q. All right, that will be a matter of argument. Now Mr. Sherrill, this other rebate that we claim in our answer, of \$249.00. Are you familiar with the facts of that?

A. I know nothing about that at all.

Q. The bookkeeping department knows that?

A. Mr. Munnell or Mr. Auspach.

Q. Now Mr. Sherrill, I want you to state what the situation was along about the 1st of December 1921—

COURT: Let me understand the condition of this record now. You are claiming that the rebate of \$249 was settled by an agreement that it should be used in cancelling the third note?

Mr. LILJEQVIST: First of all, we had an agreement when we gave the notes, we would get a rebate, that is the rebate made May 10th. Then when he came here we had this other conversation with him, and he agreed to give us credit memorandum for it, which would take care of the indebtedness.

(Testimony of Arthur J. Sherrill.)

COURT: Which finally resulted—

Mr. LILJEQVIST: In an agreement to take care of the last note. That is our claim for the agreement. We have a further claim, we will come to the third claim.

Q. Now Mr. Sherrill, will you state what the situation was about the middle of September, 1921, when Mr. Fitzgerald came up here, as to your account with the Mohawk Rubber Company, about the time you entered into this American Tire & Rubber Company deal?

A. Mr. Fitzgerald called on us—it must have been about the first week in September, along the first part of September, first or second week—and at that time we hadn't been getting along very well with the line. We had—we weren't doing very well with it, and we weren't selling any large truck tires. We had a few in stock, but hadn't been able to sell any amount, and Mr. Fitzgerald—

Q. Just right here, before you go any further. What is the fact at that time as to whether your dealers had returned stock to you and whether your dealers refused to do any business with you with reference to the Mohawk line?

COURT: I don't think that is important in this case; unless coupled up with some agreement it would not be important.

Mr. LILJEQVIST: One reason why they were willing to surrender the line.

(Testimony of Arthur J. Sherrill.)

COURT: It doesn't make any difference why they were willing to surrender, the question is whether they did surrender.

Q. All right. Go ahead and tell what your agreement was with Mr. Fitzgerald.

A. Mr. Fitzgerald first asked me about letting Mr. Cassidy sell truck tires, that is, pneumatic, that is the large sizes which we were not selling. To the best of my recollection I told him I didn't believe he could get Mr. Cassidy. Mr. Cassidy was tied up with the General Factory, and Mr. Fitzgerald then told me that he had had an interview with Mr. Cassidy, in San Francisco, I believe, and he really felt he could get Mr. Cassidy for a distributor; that Cassidy with about to sever his connection with the General Company, and he thought that if we didn't stand in his way he might get—switch the account to Mr. Cassidy; and he suggested, that, or agreed that if we would allow him to do that he would take our stock off our hands. We had the exclusive right in the territory, and if we didn't stand in his way, that he would relieve us of the stock, and while there was no amount specified, the agreement called for any stock that we might give to Mr. Cassidy we considered would be the amount of our indebtedness, and later on delivered that amount of stock.

Q. Did he have a conversation also with Mr. Munnell?

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: I move to strike the answer as a statement of conclusion, the statement that he regarded that as an agreement. He hasn't stated any conversation from which any agreement may be inferred.

COURT: You can get that on cross examination.

Exception saved.

A. Mr. Fitzgerald asked me what I thought Mr. Munnell would say about changing the line, and I said, "Well, ask Mr. Munnell what he thinks about it," and—

Q. Did he take it up with him then?

A. He took it up with him right at that time. Mr. Munnell came in, and Mr. Fitzgerald said, "Ed, if I take your stock off your hands, can I transfer the account to Cassidy or the American Tire & Rubber Company?" And Ed said, "Yes, if you relieve us of our stock you can do that."

Q. Then did you have an understanding with Mr. Fitzgerald that he could transfer the Mohawk line to Mr. Cassidy in consideration of taking this stock off your hands?

A. We did.

Mr. BISCHOFF: Objected to as leading and a statement of a conclusion.

COURT: State what the conversation was.

Mr. BISCHOFF: I move to strike the answer.

COURT: Your question is leading and calls for a conclusion.

(Testimony of Arthur J. Sherrill.)

Q. Did Mr. Fitzgerald give you a letter in writing evidencing the agreement which you had at that time with him?

A. He did.

Q. I hand you herewith a paper, and ask you to tell the jury whether or not that is signed by the Mohawk Rubber Company by Mr. Fitzgerald, Pacific Coast Manager?

A. That is his letter.

Q. Was that given to you?

A. We received that in the mail Monday morning after Mr. Fitzgerald left.

Letter offered in evidence, received without objection, marked "Defendants' Exhibit 7," and read to the jury.

Defendants' Exhibit No. 7

Portland, Oregon, Sept. 18th, 1921.

Munnell and Sherrill,

Portland, Oregon.

Dear Sirs:

This letter will be your authority to turn over to George H. Cassidy, Prop. of the American Tire and Rubber Co. of your city, any Mohawk tires or tubes that you have in stock at present and in any quantity or sizes that might be agreeable to yourselves and the said George H. Cassidy, Prop. of the American Tire and Rubber Co.

Please furnish us with a list showing the serials, styles and types of any tires that you might

(Testimony of Arthur J. Sherrill.)

turn over to the other party, also furnish us with list showing the red and gray tubes that might be transferred to the same party. Upon receipt of said lists and information, credit for the amounts will be issued to apply against your account.

Yours very truly,

Mohawk Rubber Co. Inc. of N. Y.

By W. G. Fitzgerald,

Pacific Coast Manager.

Q. Did you pursuant to that letter, furnish a list of the tires which you turned over to the American Tire & Rubber Company? Did you send the Mohawk Rubber Company a list of the tires which you turned over to the American Tire & Rubber Company?

A. Yes.

Q. Mr. Sherrill will you tell the jury whether or not Mr. Fitzgerald went over the tires at your place of business at the time you were having the negotiations which resulted in this letter which he gave your firm?

A. He did.

Q. He knew what you had there did he?

A. He did.

Q. Now will you tell the jury whether or not he did turn the Mohawk line over to Cassidy, or the American Tire & Rubber Company, pursuant to this arrangement?

A. Pardon me.

(Testimony of Arthur J. Sherrill.)

Q. Tell the jury whether Fitzgerald, on behalf of the Mohawk Rubber Company, did turn the Mohawk line over to Cassidy and the American Tire & Rubber Company pursuant to this arrangement?

A. He did.

Q. Tell the jury whether or not Mr. Cassidy, on behalf of the American Tire & Rubber Co. got from you the tires?

A. He did.

Q. Did he receipt to you for the tires which he obtained? Just tell how he got them.

A. I presume that he receipted in the usual way. He sent his truck down for the tires, and his truckman signed our shipping receipt.

Q. That is, Cassidy, on behalf of the American Tire & Rubber Company, sent his truckman up to your place of business?

A. He did.

Q. The tires were loaded on there?

A. Yes, sir.

Q. And the truckman took them away, did he?

A. Yes, sir.

Q. Did the truckman give you a receipt?

A. He signed our shipping receipt.

Q. Is that the regular way you use in your business?

A. Yes, sir.

Q. Is that the kind of form you use in your business when you ship stuff to other persons?

(Testimony of Arthur J. Sherrill.)

A. Yes, sir.

Q. Indicating the condition, etc., in which you ship it?

Mr. BISCHOFF: The paper speaks for itself as to what it is.

Q. The usual form you use?

A. Yes, sir.

Q. And the man Cassidy sent down signed this paper, did he?

A. He did.

Q. That is his signature?

A. Yes, sir.

Q. Now, Mr. Sherrill, will you tell the jury—in this letter that he wrote you and told you to furnish him list, and upon receipt of the list he would give you credit—was that list sent to the San Francisco office?

A. Yes, sir.

Q. Will you tell whether the San Francisco office gave you credit for the tires you turned over pursuant to that letter of instructions?

A. They did not.

Q. About how much credit did they give you, do you remember?

A. Well I am not certain as to the amount. I believe they gave us credit for a small amount.

Mr. LILJEQVIST: We shall call another witness to prove that, I think.

Q. Then outside of a small credit which you

(Testimony of Arthur J. Sherrill.)

got, did the Mohawk Company, the plaintiff in this case, give you any credit for the balance of the tires which you turned over to the American Tire & Rubber Company pursuant to the letter of instructions, which has been offered in evidence?

A. I didn't get that question.

Mr. BISCHOFF: Objected to on the ground there is no evidence in the record of just what was turned over, what amount of money, or how much rebate entitled to, or whether entitled to any rebate on that stock.

COURT: The witness can state what credit, if any, was given.

Mr. BISCHOFF: We submit the best evidence of these credits are the credit memorandums received, which show exactly what he received.

COURT: If he knows what he received.

Q. I hand you herewith a list and ask you if this is a list of the credits which they gave you on tires returned over to the American Tire & Rubber Company?

A. I would take it that that was the list, yes.

Q. Do you know how much the entire amount of tires was, that you turned over to that company pursuant to this letter of instructions, which they failed to give you credit for, outside of this list here which I have shown you?

A. As I recall it, approximately \$9000.

Mr. LILJEQVIST: The bookkeeping depart-

(Testimony of Arthur J. Sherrill.)

ment will show the exact figures. We offer this in evidence, after submitting to counsel.

Mr. BISCHOFF: We object to it on the ground that the credit is already accounted for in the statement which is in evidence, and to allow this individual credit would make it appear as if there were two credits for the same amount.

COURT: It is not offered for that purpose, simply offered to show the amount they didn't get credit for, that they claim they are entitled to.

Mr. BISCHOFF: The amount of \$1087.86 which is the total of this, is accounted for in the credits we gave them.

COURT: I understand that.

Mr. BISCHOFF: I don't want it to be understood they are entitled to both.

COURT: I don't understand it is offered for that.

Marked "Defendants' Exhibit 8."

Defendants' Exhibit No. 8

Credit Memo

**THE MOHAWK RUBBER CO. OF NEW YORK,
INC.**

Akron, Ohio.

Receiving Order No. 149

Credit Memo No. 392

Branch, San Francisco

Date Nov. 29, 1921

Credit to, Munnell & Sherrill

Address, 41 1st., Portland, Ore.

Salesman

Terms 5 per cent Dec. 10th

Fitzgerald T

(Testimony of Arthur J. Sherrill.)

Credit—By Return Goods Allowance:

2	33x4	SS NS	Cords	33.47	66.94
1	34x4	SS NS	"	34.11	34.11
3	33x5	SS NS	"	46.22	138.66
2	32x4	SS Rib	"	32.00	64.00
2	33x4	SS Rib	"	32.64	65.28
2	34x4	SS Rib	"	33.24	66.48
1	32x4½	SS Rib	"	36.18	36.18
2	35x4½	SS Rib	"	39.05	78.10
2	36x4½	SS Rib	"	39.85	79.70
1	33x5	SS Rib	"	45.08	45.08
2	35x5	SS Rib	"	46.63	93.26
3	30x3½	Cl NS	Fabrics	13.39	40.17
4	32x3½	SS NS	"	16.58	66.32
1	33x4	SS NS	"	22.00	22.00
1	32x4½	SS NS	"	26.27	26.27
1	40x8	SS NS	Cord	105.31	105.31
					<hr/> 1027.86
5 per cent Ex. Tax Net					51.39
					<hr/> \$1079.25

Applying on Account.

Why Passed This stock delivered direct to American Tire & Rubber Co., Portland, Ore.

Approved WGF

Q. I hand you herewith a carbon copy and will ask you if the typewritten figures constitute an original duplicate of the list which your firm sent to San Francisco, of the tires which were turned over to the American Tire & Rubber Company?

(Testimony of Arthur J. Sherrill.)

A. It does.

A. N. AUSPACH, a witness called in behalf of the plaintiff, being first duly sworn testified as follows:

Direct Examination.

Questions by Mr. Liljeqvist:

What is your business?

A. At the present time it is various duties about the office of Munnell & Sherrill.

Q. Were you employed by that firm during the year 1921?

A. I was.

Q. Now are you familiar with this letter offered in evidence as Defendants' Exhibit 7, a letter of September 18, 1921, letter of instructions?

A. I am.

Q. Will you state whether or not a list was prepared pursuant to the terms of that letter, and if so, who prepared it?

A. It was prepared by myself.

Q. And what did you do with that list?

A. I mailed it to the Mohawk Rubber Company in San Francisco.

Q. You did that personally, did you?

A. I did.

Q. Did you typewrite the list yourself?

A. I did.

Q. You are also a reporter, or shorthand man, and run a machine?

(Testimony of Arthur J. Sherrill.)

A. After a fashion, yes.

Q. Tell the jury whether you made a carbon copy of the list which you mailed to San Francisco, at the same time you made the original?

A. I did.

Q. I hand you herewith, and ask you, outside of the pencil memoranda on that paper there, if you are familiar with that document?

A. Yes, sir, I am.

Q. Have the pencil memoranda been made on there since?

A. Since the letter was written, yes, sir.

Q. The typewritten portion of that list, will you state what that is with reference to being a true copy, or otherwise, of the original which you sent to San Francisco?

A. It is a true copy.

Q. Can you fix approximately the date you mailed that to the San Francisco office?

A. It was a short time after Mr. Fitzgerald gave us instructions a very few days.

Q. And was it before you received this credit memorandum which has been offered in evidence as Defendants' Exhibit 8?

A. Yes, I think it was.

Q. Have you made an exact duplicate of this, without the pencil memoranda on it.

A. I have.

Mr. Liljeqvist: We would like to offer this, and substitute a copy. We don't like to erase the

(Testimony of Arthur J. Sherrill.)

memoranda, but will if necessary. Any objections to substituting a copy?

Mr. BISCHOFF: No objection to substituting a copy. We object to the introduction in evidence of this list, on the ground it now appears from the contract in evidence that the only tires Munnell & Sherrill were authorized to turn over to Cassidy, were such as were agreeable to him. So the material issue is, what tires were turned over to Mr. Cassidy, which tires were agreeable to him, in accordance with that letter. We are not concerned with the list sent to San Francisco; we are only to be bound by the merchandise turned over to and accepted by Mr. Cassidy.

Mr. LILJEQVIST: If there is no dispute about sending the list, we don't care; we sent the list, as we agreed to do; that is the only purpose, to show we performed our part of the agreement.

COURT: You will have to show that the tires were turned over pursuant to that contract, to Cassidy.

Mr. BISCHOFF: Does your Honor admit the list?

COURT: All they want to show is that in compliance with their instructions they sent the list to San Francisco, yes.

Mr. BISCHOFF: Save an exception.

Marked "Defendants' Exhibit 9."

Defendants' Exhibit No. 9

**LIST OF TIRES TURNED OVER TO THE
AMERICAN TIRE AND RUBBER
COMPANY**

38—30x3½ Rib:

510126	510976	494120	510460	511085	510122
510129	510978	510335	508174	508336	508185
509218	508333	510404	482160	485450	485459
482748	482754	485681	482745	482327	481445
497487	487583	497588	508324	508183	508491
508178	480384	480933	582853	481446	481326
482753	459556				

37—32x3½ NS:

556085	556387	556936	556024	556460	556821
556336	556904	556544	556219	490506	492430
498035	492370	492361	498583	492428	556906
556869	556545	556649	556587	556730	556337
487233	480071	490209	492572	492754	492268
492463	490423	556937	556388	556784	606146
605866					

33—32x3½ Rib:

428945	429018	424325	418388	429211	429012
424607	429299	494703	494771	488359	488360
452073	488796	488797	489109	488156	432002
518940	250852	514227	515789	515761	517949
494704	495397	495223	433710	433856	437445
433041	429154	438560			

11—31x4 Rib:

481114	487130	487494	486984	488038	488115
488076	487194	481533	450928	481115	

1—33x4 NS Fab:

549313

11—32x4 Rib:

466296 469787 489883 493281 532261 469645

470179 467964 458934 489686 580592

20—33x4 Rib:

502053 498644 543693 544003 543772 543541

543692 543846 543542 543773 470281 478895

470225 470561 469860 470110 471757 469542

465923 472314

17—34x4 Rib:

481340 482830 480064 480941 482172 509820

499555 508969 481835 481704 480430 482608

482359 482548 481504 482253 480948

7—34x4 N S:

504862 505364 481544 508016 504999 481609

504485

8—32x4½ N S:

583876 556537 551187 517577 517663 518047

551275 547316

1—33x4½ N S:

470548

6—34x4½ N S:

600878 600957 600790 396009 533942 600797

9—35x4½ N S:

514933 515203 514987 519152 537321 536916

514724 514986 507117

7—35x4½ Rib:

514743 317161 549346 514921 548035 548246

514721

2—36x4½ N S:

450133 440081

1—36x4½ Rib:

324439

2—34x4½ Rib:

331564 364828

2—37x5 N S:

405898 265204

1—37x5 Rib:

227326

2—35x4½ N S:

331960 327333

26—32x3½ Rib Cord:

546330 546968 546927 560827 561008 560797

560894 547117 547049 546650 546732 460961

561178 560907 561118 57542 575123 575144

560910 560858 560793 560899 562329 561084

547021 546991

12—32x4 Rib Cord:

546075 544757 545587 545893 545499 545598

546846 545834 545725 544988 546134 546871

9—33x4 N S Cord:

577101 546831 577141 576930 577172 562569

576913 577133 577204

11—33x4 Rib Cord:

575819 559316 575239 401334 414078 402967

545618 545844 576366 506256 506310

2—34x4 Rib Cord:

562360 562511

1—32x4½ Rib Cord:

530979

3—32x41½ N S Cord:

595085 595349 484387

25—34x41½ N S Cord:

546698 547162 546947 546672 546092 602730

607392 607393 607394 505777 547015 546793

546893 546865 546502 546909 547010 546853

546838 546797 546331 546526 546837 546835

547041

8—35x41½ Rib Cord:

526275 527306 525945 525862 455849 428864

429987 527596

8—35x41½ N S Cord:

506128 545630 545561 545533 506043 506512

545522 545555

4—36x41½ Rib Cord:

412156 491596 473432 413761

3—33x5 Flat Cord:

619463 619636 618963

1—33x5 Rib Cord:

547096

3—36x6 N S Truck Cord:

546548 546154 546205

1—38x7 N S Truck Cord:

594418

2—35x5 Rib Cord:

451665 500849

1—40x8 N S Cord:

586135

2—36x41½ Rib Cord:

586168 586173

(Testimony of Arthur J. Sherrill.)

24—32x3½ N S Cord:

561424 561354 575211 575320 575678 575697

575679 575747 575740 575715 575745 575720

575708 575703 546925 547140 561557 561550

z 561603 561472 561529 561426 561383 561497

3—36x6 Tubes

1—38x7 “

2—40x8 “

Cross Examination.

Questions by Mr. Bischoff:

Did you write a letter which accompanied this memorandum?

A. I don't remember whether I did or not.

Q. What is there about this memorandum which fixes the time when you prepared it and sent it?

A. The only thing would be the instructions from Mr. Fitzgerald. The list is headed with notation that they were turned over to the American Tire & Rubber Company.

Q. What is there about it that indicates or brings to your mind that it had been mailed or sent to San Francisco. I am trying to find out?

A. Well, I recognize the list as one I made at the time, and I know I mailed it.

Q. Did you personally deliver the tires to Cassidy?

A. I know he called for them, his transfer man called for them.

Q. Where did you get this list—the information from which you made this list?

(Testimony of Arthur J. Sherrill.)

A. I counted the tires.

Q. When did you count the tires?

A. Preparatory to Cassidy calling for them.

Redirect Examination.

Questions by Mr. Liljeqvist:

Did you count the tires that were put on Cassidy's truck?

A. As they were put on Cassidy's truck?

Q. Yes.

A. No, I counted them before they were put on the truck.

Mr. LILJEQVIST: I offer this receipt in evidence, which has been heretofore testified to.

Mr. BISCHOFF: Objected to as not binding upon the defendants. Shipping receipt, and signed by some drayman, and by which it certainly cannot be bound.

COURT: Only competent for the purpose of showing or pretending to show delivery by the defendant to Cassidy.

Mr. BISCHOFF: He also claims for it something about the printed notice, "Received in good order," and intends to claim by that that we are bound by the condition as receipted for.

Mr. LILJEQVIST: Cassidy's man came after it.

COURT: I know.

Mr. BISCHOFF: Do I understand your Honor does not permit for the purpose of proving condition?

(Testimony of Arthur J. Sherrill.)

COURT: No, the mere fact of delivery.

Marked "Defendants' Exhibit 10."

Defendants' Exhibit No. 10

BILL OF LADING

Received from Munsell & Sherrill, at Portland,
Oregon 9-21-21.

Consigned to American Tire and Rubber Com-
pany.

366 Tires

6 Tubes

Transfer
per Fisher

Agent

Mr. LILJEQVIST: We save an exception to
that part of the ruling which does not permit in-
formation as to the condition of the tires when
received, "In apparent good order."

Q. Do you know whether the number of tires
indicated in that receipt were turned over to this
transfer man?

A. I am not positive, no.

Q. You didn't count them up yourself?

A. No.

Recross Examination.

Questions by Mr. Bischoff:

I want to ask a question. You have been talk-
ing about Cassidy's truck. Do you know whether
Cassidy ever had a truck?

A. I presume it was his truck.

Q. You presume it?

(Testimony of Arthur J. Sherrill.)

A. He sent it down.

Q. Isn't it a fact this was a truck furnished by some dray company—some transfer company?

A. Apparently, from the way it was sent.

Q. Do you know, of your own knowledge, who requested that truck to come there?

A. I do not.

Mr. BISCHOFF: I move to strike the testimony of the witness that Cassidy's truck was sent.

Mr. LILJEQVIST: I ask did you order that truck?

Mr. BISCHOFF: We deny that Cassidy sent for any tires.

Mr. LILJEQVIST: Did you order that truck, or that drayman, to come after those tires?

A. I did not.

Witness excused.

A. J. SHERRILL resumes the stand.

Direct Examination.

Questions by Mr. Liljeqvist:

Mr. Sherrill, tell the jury whether or not you employed this transfer man or drayman to come and get those tires?

A. I did not.

Q. Did Munnell & Sherrill employ him, or engage him, or ask him to come?

A. Not to my knowledge.

Q. You didn't do it personally?

A. No.

(Testimony of Arthur J. Sherrill.)

Q. Do you know whether the number of tires shown in that receipt were turned over to this transfer man?

A. I don't know whether they were or not.

Q. That is the receipt he gave?

A. He receipted for that number of tires, and they didn't report shortage at the other end.

Q. Will you state whether or not Cassidy ever made any complaint to you with reference to these tires?

A. He did not.

Q. Counsel has made some reference to the tires, that it was agreed upon that you should turn over to Cassidy such tires as were agreeable to him. Now this list of tires that was turned over to Cassidy, will you state whether or not Mr. Fitzgerald, of the plaintiff company, went through that list of tires with you and saw them?

A. He did.

Q. And later on when the drayman came, will you tell whether the tires that were given to him were part of the tires which Mr. Fitzgerald saw?

A. They were.

Q. Did Mr. Cassidy ever, or did the American Tire & Rubber Company ever offer to return to you any tires which you turned over to them when the drayman came?

A. No, sir.

Q. Did they ever kick to you about not getting

(Testimony of Arthur J. Sherrill.)

enough, or getting too many, or anything the matter with the quality, or anything else?

A. No, sir.

Q. Did he ever indicate to you that he didn't agree to receive from you these tires which you turned over to him?

A. No, sir.

Q. And the next thing you ever heard about this transaction, was it from Cassidy, or from whom was it?

A. It was from San Francisco, the Mohawk Rubber Company.

Q. Now Mr. Sherrill, will you tell the jury whether these tires which you turned over to the American Tire & Rubber Company constituted your entire stock of tires?

A. They did not.

Q. How many tires did you keep?

A. I couldn't say for sure, but I believe it was \$4000 or \$5000 worth of stock.

Q. Where were the tires which you kept?

A. A portion of them were in our—in our store at First and Ash, and a portion were up at the retail store upon Broadway.

Q. Those that were at your retail store, or at your store up at—what place you say?

A. First and Ash.

Q. Those are the ones which Mr. Fitzgerald saw?

(Testimony of Arthur J. Sherrill.)

A. Yes.

Q. You kept part of those, did you?

A. We kept part of those, yes, sir.

Q. Did you send any to Cassidy from the upper store at all?

A. No, sir.

Q. Do you remember approximately how many tires you kept at the upper store?

A. I imagine there was probably \$1500.

Q. About what?

A. About \$1500 worth.

Q. Then of the entire stock that you had, you retained about \$1500 worth, which was at your store on Broadyay, wasn't it?

A. Yes.

Q. Broadway and what street? What is the name of that other street?

A. Broadway and Ankeny.

Q. Those tires up at that store, did Mr. Fitzgerald see those?

A. No.

Q. And they were not transferred to Cassidy?

A. No.

Q. Will you tell the jury whether Mr. Fitzgerald saw, or had opportunity to see and examine with as much detail as he desired, all the tires which you turned over to the American Tire & Rubber Company?

A. He took the stock with me, we took the stock together.

(Testimony of Arthur J. Sherrill.)

Q. Mr. Fitzgerald didn't tell you—pick out certain ones you should give the American Tire & Rubber Company—and not others?

A. No.

Q. As I understand from you. Did you ever receive any complaint from the American Tire & Rubber Company in reference to the tires, the amount the receipt mentioned, the quality or condition, or otherwise?

A. Never did.

Q. Tell the jury whether you ever got any credit from the American Tire & Rubber Company outside of this small credit which has been shown here in this list offered in evidence. If you ever got any credit at all on the entire amount of tires you delivered to the American Tire & Rubber Company, outside of this credit?

COURT: He has testified three times about that.

Q. Will you tell the jury whether or not you have tendered into court the amount of money you claim is due from you to the Mohawk Company?

A. We tendered the amount we claim is due the Mohawk Rubber Company.

Q. Did you offer to pay that before they brought the lawsuit?

A. We did.

Q. Will you tell the jury whether any money due or owing from Munnell & Sherrill to the Mohawk Rubber Company?

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: That is objected to.

COURT: That is the question we are trying to find out. That is what this jury is for.

Cross Examination.

Questions by Mr. Bischoff:

You say you tendered some money. You mean you offered to pay the plaintiff the balance, or do you mean to say you gave the Clerk of the Court some money?

A. We sent a check to Mohawk Rubber Company.

Q. That check was returned to you, wasn't it?

A. It was.

Q. Well did you give any money to the Clerk of the Court?

A. I believe we did, yes, sir.

Q. Do you know whether you did or not?

A. It is handled by Munnell or Mr. Auspach.

Q. You don't know of your own knowledge whether any money was tendered in court or not, do you?

A. I didn't bring it up myself.

Q. Then you don't know.

Mr. LILJEQVIST: If it hasn't been, it is our mistake, and we will bring it in the morning. The Clerk can tell us that.

Mr. BISCHOFF: I want to find the accuracy of his statement.

(Testimony of Arthur J. Sherrill.)

Mr. LILJEQVIST: He gave it to us to pay, and I suppose Mr. Cake did it.

COURT: Go on with your examination.

Q. You began doing business with the Mohawk Rubber Company when?

A. In 1919.

Q. About what part of the year 1919?

A. The early part of the year, along in March I believe; March or April.

Q. Now the beginning of your arrangements with that company was an interview with Mr. Fitzgerald, wasn't it?

A. No, it was an interview with Mr. Cowden.

Q. But, before you concluded your arrangements, you had an interview with Mr. Fitzgerald, didn't you?

A. Yes, sir.

Q. And your arrangements with Mr. Fitzgerald in that respect were confirmed by a letter from the home office in Akron, Ohio, is that right?

A. We received a letter from Mr. Mason in reply to our request for contracts.

Q. And you did get a reply, didn't you?

A. Yes, we did.

Q. And that was the letter which formed your contract?

A. It wasn't exactly a contract, it wasn't signed by us.

(Testimony of Arthur J. Sherrill.)

Q. But you acted upon it, didn't you? Didn't you act upon that letter?

A. Well to a certain extent I presume we did.

Mr. BISCHOFF: Letter dated June 18th, 1919, offered in evidence, marked "Plaintiff's Exhibit F," and read.

Plaintiff's Exhibit F

Akron, Ohio, U. S. A., June 18, 1919.

Munnell & Sherrill,

40 First St., Portland, Ore.

Gentlemen:

Confirming conversation with our Mr. Fitzgerald, it is our understanding that he has arranged to turn over to you the State of Oregon with the exception of towns where we have established accounts, also the following territory in Washington: South of Snake River, Walla Walla excluded in the event you do not establish an account there in 90 days. Towns along the Northern Pacific Railroad, north to Centralia, thence to South Bend. In the State of Idaho, towns on the Union Pacific Railroad south to Mountain Home.

The City of Portland is included in the territorial arrangement, conditioned upon your opening a retail store to sell Mohawk tires, and in the event you do not do this within the next three months, we have the privilege of taking this town over and soliciting a retail account.

TERMS: Monthly settlement of account by cash

(Testimony of Arthur J. Sherrill.)

less 5 per cent on the 10th of the month on shipments from San Francisco Branch. Monthly settlement of account by cash less 5 per cent on the 10th of second proximo on shipments from the factory. These terms may be deviated from by mutual consent without affecting other rights of either party.

FREIGHT CHARGES: We allow you freight on all shipments of 100 lbs. or more where made from the Branch or from the factory. On express shipments where they would be entitled to freight allowance, an amount equal to the freight will be allowed.

ADVERTISING: We agree to supply you with pamphlets, price lists and other advertising matter which we shall get out, in such quantities as you can use to advantage, without any additional charge except the customary charge, if any, made to our regular customers.

This agreement is subject to fire, strikes and other delays beyond our reasonable control, and expires by limitation on September 1, 1919, but may be renewed by mutual agreement in writing at that time.

Very truly yours,

The Mohawk Rubber Company,

M. E. Mason,

Sales Manager.

MEM-RJ

Dict. 6-17-19

(Testimony of Arthur J. Sherrill.)

Q. Did you make a response to that letter, disputing any of its terms?

A. I don't personally recall having read that letter.

Q. You went right ahead and operated under that arrangement, didn't you?

A. I say I don't personally recall that particular letter.

Q. Now when this arrangement terminated by its own terms, September 1st, 1919, did you make any other agreement with them in writing?

A. No, sir.

Q. Now Mr. Sherrill, you have testified here to a number of conversations which you say you had with Mr. Fitzgerald, in which he made certain—you say he made certain promises or agreements. Did you ever inquire of Mr. Fitzgerald if he had authority to make those promises?

A. No, sir.

Q. Did Mr. Fitzgerald ever volunteer any statement to you as to the scope or extent of his authority to make promises on behalf of his company?

A. It is possible that he might.

Q. Have you any recollection as to that?

A. I haven't any particular recollection.

Q. Do you recall him stating to you on one or more occasions that he had no authority to agree to a return of the merchandise, or with respect to

(Testimony of Arthur J. Sherrill.)

any arrangement as to credit and things of that character?

A. Possibly at different times he has mentioned his authority.

Q. He told you that, didn't he?

A. I don't know of any particular instance.

Q. I am not asking you when it took place, but he did at times talk to you along that line, didn't he?

A. We were accustomed to have branch managers—

Q. Now Mr. Sherrill, you have heard the question, and I am going to ask you to answer that question and not something else.

A. I can only answer by saying I don't recall any particular time. It is possible that he has.

Q. Such conversation did take place?

A. Possibly.

Q. Now to further refresh your recollection along that subject, isn't it a fact that he told you about those things whenever you were making a request to Mr. Fitzgerald that he secure certain credits for you, or he consent to the return of merchandise, or when you asked him to take back merchandise; didn't he on those occasions tell you that he couldn't do anything for you, but would have to relay it back to Akron?

A. No, sir.

Q. Never told you that?

(Testimony of Arthur J. Sherrill.)

A. At the time the arrangement was made with Mr. Fitzgerald for taking back the stock—

Q. Beg your pardon?

A. At the time the arrangement was made—at one time arrangement was made with Mr. Fitzgerald that he didn't state he would have to take up with the factory.

Q. On one occasion he didn't state that?

A. Yes.

Q. But on other occasions he did tell you that?

A. It is possible.

Q. Now do you recall an instance when you had taken a large order for about \$10,000 worth of merchandise from a concern here, and later found they couldn't use it, or wouldn't take it. Do you remember that instance?

A. Yes, sir.

Q. And you wanted Fitzgerald to take that merchandise back, didn't you, when he was here, and you spoke to him about it?

A. That was included—that order was included in the merchandise that we were asking him to take back.

Q. You asked him to take it back?

A. Yes, sir.

Q. And didn't he tell you on that occasion that he couldn't determine that matter, that that was out of his jurisdiction and he would try to see what he could do for you?

(Testimony of Arthur J. Sherrill.)

A. He told us at various times to return tires. He told me in San Francisco in July, to return tires.

Q. Mr. Sherrill, I want you to stick to the incident I am talking about. We will come to the other later. I am talking about the time when you requested Mr. Fitzgerald to take back the \$10,000 worth of tires, the tires that were shipped to enable you to fill that order, and when you found you couldn't fill it, you requested him to take that stuff back. Didn't he tell you then that he couldn't tell you anything about it? That he had no authority? That he would have to take it up with the home office and see if he couldn't induce them to permit him to take them back, or words to that effect?

A. I don't recall that.

Q. Did he say anything to you on that subject at that time?

A. He has at various times.

Q. He has told you that he would have to take it up with the home office, at various times? Is that right?

A. Certain things.

Q. Now you spoke of some tires being returned. Now Mr. Sherrill, isn't it a fact that that had reference to tires where adjustments were made for defective condition; that is, if a customer brought back a tire because it hadn't worn properly, you were privileged to return it and get an adjustment on that account? Isn't that right?

(Testimony of Arthur J. Sherrill.)

A. That would be one of the times, yes.

Q. In such instances there never was any dispute between you and Fitzgerald, or with the Mohawk people, was there?

A. No, sir.

Q. They always permitted you to return those defective tires, and they gave you credit by shipping another tire, or gave you a credit memorandum for it?

A. Yes, sir.

Q. But when you wanted to return tires out of stock, then Mr. Fitzgerald said to you that he would have to take it up with the home office, and suggested that he would do his very best to have them make favorable adjustment with you, is that right?

A. Not at the time that we agreed in San Francisco on the return of the stock; he didn't say anything about that.

Q. But at other times he did?

A. It is possible he did.

Q. So that you knew to some extent, at any rate, that his authority to make agreements with you was not complete, that it was limited, that he did have to ask authority or consent from the home office?

A. Well, the same as any other coast manager, I presume.

Q. I am going to ask you to answer that question. (Question read.)

A. I would presume that he would have to take

(Testimony of Arthur J. Sherrill.)

up matters of importance with his home office, yes, if it was a matter of importance.

Q. You knew that. Now then you began your arrangement for the purchase of tires along in the spring of 1919?

A. Yes.

Q. Shortly after that letter was received, is that right?

A. Yes.

Q. Began buying and paying for them, etc.?

A. Yes.

Q. Now you began to fall behind in your payments, the payment of your account with the company, towards the latter part of 1920, didn't you?

A. I believe it was along about that time, yes.

Q. Conditions weren't very good with you at that time with respect to the sale of tires?

A. No, they were not.

Q. And that resulted in your inability to meet payment of your accounts as they became due?

A. Yes, sir.

Q. Now in addition to that, you found yourself in the situation where you had placed this large order which had been placed with you by another dealer or another concern, and were unable to deliver that order; that complicated the situation then?

A. It did.

Q. And it was that situation which led up to the

(Testimony of Arthur J. Sherrill.)

settlement which you arranged tentatively in the end of November, 1920, with Mr. Fitzgerald, subject to the approval of the home office, wasn't it?

A. Yes.

Q. Your answer is yes. And that arrangement was that you were to receive—that they were to take back tires amounting to \$6629.73, which would also entitle you to a further credit of \$331.48, which was the war tax which you had been charged on that amount of tires, and for the balance of your account the five notes were to be given, is that right?

A. That is right.

Q. And these two transactions, these two items, settled up the entire account between you and the Mohawk Company up to that time, didn't it?

A. Yes, I believe it did.

Q. And from that time on you treated the notes as payment, did you? You started, so to speak, with a new slate?

A. Yes.

Q. Now in order—speaking of that \$10,000 order, the tires which subsequently had to be taken back, it was a fact, wasn't it, that there was some question as to whether the plaintiff, the Mohawk Company, would accept that order upon the basis that you submitted it, wasn't there?

A. Yes, sir.

A. At about that time there was a rise in the

(Testimony of Arthur J. Sherrill.)

price of tires?

A. Yes, sir.

Q. And Fitzgerald had advised you of that rise, is that right?

A. Yes, sir.

Q. And he told you also that all orders taken after a certain date would have to be at the advanced price?

A. Yes, sir.

Q. Is that right? Now then this \$10,000 order which we have been speaking about, you procured a day or so after the date which Mr. Fitzgerald fixed as the time limit for taking orders at the old price. Is that right?

A. I believe that is correct, yes, sir.

Q. And you then wired him asking him if he couldn't put through that order for you at the old price?

A. Yes, sir.

Q. I show you this telegram of March 8, 1920, and ask you if that is the wire in which you made that request?

A. That is the wire.

Telegram offered in evidence, marked "Plaintiff's Exhibit G," and read.

Plaintiff's Exhibit G

Portland, Oregon, Mar. 8, 1920.

Mohawk Rubber Co.,

San Francisco, Calif.

Closed contract today ten thousand dollars, can

(Testimony of Arthur J. Sherrill.)

you protect us old price for that amount in addition to what we have ordered can wire specifications tonight.

Munnell & Sherrill.

Mr. BISCHOFF: Wire of March 8th, from the Mohawk Rubber Company to Munnell & Sherrill.

Offered in evidence and marked "Plaintiff's Exhibit H."

Plaintiff's Exhibit H

San Francisco, Cal. 8.

Munnell and Sherrill,

40 First St., Portland, Oregon.

Your wire received we presume deal you closed was the one Fitzgerald and Sherrill were working on if we are correct we will protect you the amount of their order send specifications immediately with their signature.

Mohawk Rubber Co.

Mr. BISCHOFF: Letter of March 9, 1920."

Offered in evidence and marked "Plaintiff's Exhibit I."

Plaintiff's Exhibit I

San Francisco, Cal., March 9, 1920.

Munnell & Sherrill,

40 1st Street, Portland, Oregon.

Attention of Mr. E. J. Munnell.

Gentlemen:

This will acknowledge your letter of the 4 inst.,

(Testimony of Arthur J. Sherrill.)

pertaining to the communication you have received from Coffin & Beglan of Boise, Idaho. We note the copy of their letter which you inclosed, and beg to advise that it is possible Mr. Coffin has come into contact with one of our large distributors in the state who are obtaining the discount of 25-5-5 per cent trade with the usual 5 per cent for cash. We beg to advise that if Mr. Coffin had of taken the trouble to call on a few of our dealers in California, he will find that the discount you are quoting him is considerably better than he could obtain from us if he was buying direct.

We note that he states that we have a few accounts in this California territory that are obtaining even 5 to 7½ per cent, beyond 25-5-5 per cent trade. In this he is absolutely mistaken, and if he has any money to lose in making a bet that he is correct, why just send him around to us, and we will cover every dollar that he will put up.

You will find that it is very often the case when one dealer calls on another, they endeavor to try and make each other believe they are receiving confidentially something a little better than usual. Or, in other words, they like to make the other fellow believe that they are on the inside exclusively. We are not trying to find any alibis for having extended in several instances, the discount of 25-5-5 per cent trade to several concerns in this state, and you would find in each district where this discount has

(Testimony of Arthur J. Sherrill.)

been quoted it has been strictly on a distributing basis.

Yours very truly,
Mohawk Rubber Co. of N. Y. Inc.
By Pacific Coast Manager,
W. G. Fitzgerald.

WGF-MMcG

Dic-3-8-20

Q. Letter dated March 9th.

Offered in evidence and marked "Plaintiff's Exhibit J" and read to the jury.

Plaintiff's Exhibit J

San Francisco, Cal., March 9th, 1920.

Munnell and Sherrill,

40 First St., Portland, Ore.

Gentlemen:

We received late yesterday afternoon your wire stating that you had closed a contract for ten thousand dollars (\$10,000.00), and asking advice as to whether you would be protected to that amount at the old prices. In answer to your communication, we wired you as follows:

"Your wire received. We presume deal you closed was the one Fitzgerald and Sherrill were working on. If we are correct, we will protect you the amount of their order. Send specifications immediately with their signature."

We received advice from the factory the latter

(Testimony of Arthur J. Sherrill.)

part of last week instructing us not to accept any more orders on the basis of the old price. However, as mentioned in our telegram, we presume the deal you refer to is the one pertaining to the distribution of our product in the city of Portland.

We were advised last week by Mr. Munnell that this deal would probably go thru and we take it for granted the reason we did not hear from you definitely on the matter, prior to yesterday, was on account of Mr. Sherrill being quarantined with the flu.

We trust that we are correct in regard to your order and upon its receipt duly signed by the original purchaser, we will relay same to the factory and endeavor to have it put thru at the old price.

We trust your city connection will work out nicely for you and with our kindest regards, we are

Yours very truly,

Mohawk Rubber Co. of N. Y., Inc.

By W. G. Fitzgerald,

Pacific Coast Manager.

Mr. BISCHOFF: I offer in evidence letter of March 15th.

Marked "Plaintiff's Exhibit K" and read to the jury.

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit K

San Francisco, Cal., March 15, 1920.

Munnell & Sherrill,
Portland, Oregon.

Attention Mr. Al Sherrill.

Gentlemen:

This will acknowledge your letters of the 13th inst., and also the signed orders you received from Miles and Clark and the Broadway Tire Shop of Portland, Oregon.

We note what you say in reference to the connection you have made with the Broadway Tire Shop, and your failure to interest locally, Miles & Clark, whom you had in mind originally.

You will recall our telephone conversation of one week ago, in which we stated that we would be willing to protect you to the extent of your Portland customer's order, which was not to aggregate over \$10,000. On making you this promise, we were doing so without the authority of the factory, but believed if the circumstances had been placed before them, they would consent to the agreement we promised. We note the order you have obtained from the Broadway Tire Shop, and consider same as the one we referred to as your Portland customer. We are sending this order to our factory, and according to your instructions, are requesting that they hold the same in abeyance, until you receive information as to what we will do in refer-

(Testimony of Arthur J. Sherrill.)

ence to the order for Cord Casings that you obtained from Miles & Clark.

We carefully note what you say in reference to these people having taken on the Templar line of cars and their distributing arrangement, covering seven counties in eastern Oregon and Washington. They are, no doubt, very fine people to do business with, and their order is tempting, but nevertheless, we can offer you no hopes as to its being accepted by the factory. This Branch as well as all of the other branches of the organization, were given explicit instructions on March 6 not to accept any more business at the old figures, and as mentioned to you in our recent telephone conversation, the only reason that we could take a chance on accepting the order from Broadway Tire Shop of Portland, was because you had this deal under way for some time, and it would have probably been consummated prior to March 8, if it had not been for circumstances beyond your control.

We are anxious to help you in every reasonable manner to obtain as much business as possible, and sincerely regret that the Miles & Clark deal was not consummated prior to the change in prices. You will recollect that the writer, on his recent visit, advised you to expect an advance in prices most any day, and that the minute this Branch received this information from the factory, that it would not

(Testimony of Arthur J. Sherrill.)

be possible for us to handle any more business on the old basis.

We are today writing Mr. Mason, laying all the facts concerning the Miles & Clark order before him, and are requesting that he wire you his decision in the matter.

We note in your other letter of the 13th inst., you mention that what you want from the factory at the old price is the order from Broadway Tire Shop, and 175 32x4 Cords for Miles & Clark. We also note that you state, should the factory not pass favorably on the Miles & Clark order, then you want the privilege of sending new specifications on the Broadway Tire Shop order. We are giving the factory this information, and they will handle the matter accordingly.

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:MM

Dic-3-15-20.

Q. Mr. Sherrill, in respect to the last two orders, the fact of the matter was that you originally wired with respect to one order that you placed, and that was the Miles & Clark order, didn't you?

A. Well, at the time when Mr. Fitzgerald was here, and we were working on that order, we were endeavoring to get Miles & Clark to take Portland

(Testimony of Arthur J. Sherrill.)

as well as Eastern Oregon, but we were unsuccessful in that, and made another connection.

Q. That was the only order that he knew of, that you had under consideration when he left here—

A. No.

Q. And which had not been completed before the rise in price, isn't that right?

A. No, there were two. There were two deals, but they were both with the same people. One would have been in the City of Portland, the other in those seven counties mentioned in the letter.

Q. One was the Broadway Tire Shop?

A. Yes.

Q. The other was the Miles & Clark proposition?

A. Yes, sir.

Q. And when Mr. Fitzgerald left here the only matter that he knew anything about, that you had up and hoped to consummate, was this \$10,000 worth of tires for the Miles & Clark people. Is that right?

A. He knew that we were trying to put an agency in Portland.

A. And that is the one he had in mind when he received your wire asking him to accept that order at the old price. That is right, isn't it?

A. I don't know what he had in mind. It is possible.

(Testimony of Arthur J. Sherrill.)

Q. Isn't that what he asked you in the wire? He presumed that was the one you were talking about when he was there. That is the only one you had discussed with him.

A. There were two separate propositions. One was for the city, and one was for the country. We discussed both propositions.

Q. At any rate, what you were trying to do was to get Fitzgerald to put through these two orders for you at the old price after the new advanced price had gone into effect?

A. Yes, sir.

Q. And Fitzgerald told you that he would have to put that up to the factory, that he couldn't do that for you?

A. One he put up to the factory and one he handled himself.

Q. He told you in this letter, didn't he, he would relay that to the company and ask the company?

A. But the Broadway Tire Store he was to take care of himself.

COURT: I think the letter speaks for itself.

Mr. BISCHOFF: The letter will speak for itself.

Q. Now isn't it a fact that you actually did not have these orders fully consummated when you asked them to put through that order at the old price, and that you couldn't make it stick afterwards?

A. We had arrangements made for both places.

(Testimony of Arthur J. Sherrill.)

Q. But the arrangements hadn't come to such a point that you could compel the acceptance of that order and obtain payment therefor, had it?

A. It is pretty hard to compel acceptance and payment of any order on tires.

Q. The fact of the matter was you were doing a little speculating on account of this rise in price, and you wanted to get the benefit of that rise and get these two orders billed at the low price?

A. No, the tires went to the two stores, one went to the Broadway store, and one went to Miles & Clark.

Q. And you took them back?

A. We had to take them back, yes.

Q. I show you this letter of March 19th. Is that the letter you wrote to plaintiff in respect to these two transactions?

A. Yes, sir.

Mr. BISCHOFF: I offer in evidence this letter of March 19th from defendant to plaintiff.

Received without objection, marked "Plaintiff's Exhibit L," and read.

Plaintiff's Exhibit L

Portland, Ore., March 19, 1920.

Mohawk Rubber Co.,

San Francisco, Cal.

Attention Mr. J. W. Fitzgerald.

Gentlemen:

Replying to yours of March 15th, we note that

(Testimony of Arthur J. Sherrill.)

you have "passed the buck" up to the factory, and we trust that they will see their way clear to grant us what we ask in this matter, and unless they do, we are going to find ourselves in a pretty tight place.

Both of these deals were started some time before the advance, and were put thru as rapidly as possible under the circumstances, and both with the idea of securing a stock of tires to start in on at the old figure. While they were both practically certain, yet we did not feel at liberty to place the orders until the leases were signed, and we were absolutely sure of the deads going through, as you know it sometimes requires considerable time to thrash out these matters, and in this case unfortunately they both ran past the time of advance.

I would like to say right here that the Mohawk Rubber Co. is what we would class good average folks. They were slow to decline, but made it up by being quick to advance. When the decline came there were several days that we were left in doubt, but not so when the advance came; in fact, according to your letter they anticipated it by two or three days.

Now, Fitz, we are leaving this in your hands, and expect you to go to bat for us, as mentioned before. Unless we do not receive some assistance from the factory, we are out of luck, as Miles & Clark have already drawn 21 32x4 from our stock,

(Testimony of Arthur J. Sherrill.)

which was all we had left, and we have given them our word that we would take care of them for enough Cords to equip their 35 cars. Unless we get these out of the factory, we are going to be forced to sell them at a loss, as we have no intention of going back on our word with them.

Our reasons for wishing to submit new specifications, in event of the factory turning these two orders down, was in order that we might change the order to include these Cords. Then we would fill the balance of their order and the Portland store order from the remains of our Portland stock, being forced to fill out the balance with stock bought from the factory at the new prices.

He are enclosing you proposition submitted us by the Ramsay Sign Co., and would appreciate hearing from you at an early date in this matter, as now that the Portland retail store is assured we wish to get action on the advertising end of it just as soon as possible. He took this matter up with three different concerns, and feel that the proposition submitted by the Ramsay people is not only more economical, but believe that owing to our being personally acquainted, we will be assured of better service. Mr. Munnell and myself have come to the conclusion one or two large bill boards, supplemented with a number of the milepost bulletins, would be the proper thing for us. However, we would like your ideas in this matter.

(Testimony of Arthur J. Sherrill.)

Trusting with your able assistance we will get lined up all O.K. with the factory, and with best regards from all, we are,

Yours very truly,

Munnell & Sherrill,

By A. Sherrill.

AJS-D

Enc.

Mr. BISCHOFF: Letter of March 23rd, 1920.

Offered in evidence, received without objection, marked "Plaintiff's Exhibit M," and read.

Plaintiff's Exhibit M

San Francisco, Cal., March 23, 1920.

Munnell & Sherrill,

Portland, Oregon.

Gentlemen:

This will acknowledge your letter of the 19th inst., in regard to the orders you obtained from the Broadway concern and Miles and Clark.

We note what you say about the writer "passing the buck" to the factory and being as we know you so well, and occasionally indulge in a little kidding, we are taking this jolt good-naturedly.

We wonder if you ever stop to figure the use in advancements if the jobber and the manufacturer load up their customers with stock on old prices. You must acknowledge that the writer advised you weeks ago that an advance in prices was a cer-

(Testimony of Arthur J. Sherrill.)

tainty, but just when they would go into effect he was not in a position to state. However, he did mention that when the advance did go into effect, we would cease taking orders on the old basis, so in view of these facts, we believe that you will agree that you were taken care of in fine shape.

You probably know that the writer handles the territory strictly in accordance with the rules and policies outlined to him by the factory and in cases where considerable money is involved, it is necessary for him to confer with the factory before committing himself.

We had no doubts but what the factory would accept the order from the Broadway store because the writer personally knew you had been working on this deal for considerable time and he believes that it would have been put over prior to the advance if it had not been for Mr. Sherrill's illness, so this is the reason that we took the authority of committing ourselves on this particular order. We could not give you definite information on the Miles and Clark order, however, until we had explained the circumstances to the factory, and we were doubtful if they would accept this order on the old basis. However, they wired us last Saturday stating that they would accept one hundred and seventy-five (175) cords on Miles and Clark's order at the old price and also protect you to the extent of the Broadway store order.

(Testimony of Arthur J. Sherrill.)

The factory also requested that we wire them immediately giving shipping instructions. We accordingly wired you requesting that you advise us at once concerning same and this morning we are in receipt of your telegram giving shipping instructions and also changes which you desire made on the orders. We are wiring the factory this information, and no doubt a part of your order will be started within the next several days.

We believe now that all of these matters have been attended to and you are going to get the tires at the old prices, we all have good reason to be happy.

While you occasionally hand the writer some pretty hot shots, you must agree that we have been on the job every minute and have endeavored to take care of your every requirement.

With kindest regards and trusting that Mr. Sherrill will soon favor us with that long promised visit, we are,

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF-RD

Dict-3-23-20.

Mr. BISCHOFF: The letter of April 3rd, please.

Offered in evidence, received without objection, marked "Plaintiff's Exhibit N," and read.

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit N

San Francisco, Cal., April 3, 1920.

Munnell and Sherrill,

40 First St., Portland, Oregon.

Gentlemen:

We are in receipt of a communication from the factory, stating that agreeable to your request they will make changes on the order from the Broadway Tire Shop by cancelling all of the 30x3, 30x3½, 34x4 and 33x4½ fabric casings and all inner tubes; adding to the order ten each 32x3½ and 34x4½ cords, five 33x5 N S cords and twenty-one 32x4 ribbed cords.

The factory also states that shipment will go forward immediately.

We trust the above information is pleasing to you and that the goods will reach you promptly and in time for your customer's requirements.

Very truly yours,

Mohawk Rubber Co. of N. Y. Inc.

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:RD

Dict. 4-3-20.

Mr. BISCHOFF: I offer in evidence letter of June 25, 1920, from defendant to plaintiff.

Received without objection, marked "Plaintiff's Exhibit O," and read.

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit O

Portland, Oregon, June 26, 1920.

Mohawk Rubber Co.,

San Francisco, Cal.

Attention Mr. Fitzgerald,

Pacific Coast Manager.

Gentlemen:

You probably have been wondering why check has not been mailed you covering that part of our account, which has not been closed by trade acceptance. In answer, will say, that we have been receiving more tires back from our customers during the past thirty days than we have sent out, and we find ourselves loaded to the guards with stock, and up against a stone-wall refusal from our bank for any more assistance. They take the stand it is time for the Eastern manufacturer to carry a portion of the load. In other words, Oregon manufacturers of lumber products, fruit and salmon canners are being obliged to accept paper from their Eastern customers, while it has been the custom for the Eastern manufacturers to demand cash for materials which have been shipped to the Coast. They claim there is an actual money shortage in the Northwest on this account.

While we dislike sending any of the tires back to the factory, it is absolutely necessary that we be given sufficient time in which to dispose of them, or have them taken off our hands in filling orders

(Testimony of Arthur J. Sherrill.)

which you have from other points in the Northwest or California. There is no tire business here. We have a very complete line of sizes, which other manufacturers are supposed to be short on. This includes Ford sizes 32x4, 33x4 and 34x4 in both Cords and Fabrics.

We would be very glad to keep the tires and use our best efforts to dispose of them, but as mentioned above will have to look to you for help in the way of some method of payment which we are able to handle.

Please let us have your views on the subject, and awaiting your reply, we are,

Yours very truly,

Munnell & Sherrill,

By E. J. Munnell.

EJM-D

Mr. BISCHOFF: I offer in evidence letter of June 29, 1920, from defendant to plaintiff.

Received without objection, marked "Plaintiff's Exhibit P," and read.

Plaintiff's Exhibit P

Portland, Oregon, June 29, 1920.

Mohawk Rubber Co.,
Akron, Ohio.

Gentlemen:

We are obliged to ask you to hold our trade acceptance due on July 10th until such time as we dispose of enough tires to handle. As we wrote

(Testimony of Arthur J. Sherrill.)

your San Francisco office a few days ago, we are taking more tires back from customers than we are sending out, and we are doing this rather than lose the tires, as the country dealer is being hard hit by the conditions pertaining at this time.

Our bank has gone the limit with us, and requests that our source of supply assist in carrying the load until conditions improve. We earnestly hope that, with good warm weather and a loosening up of the gasoline restriction, the tire business will improve during the next few weeks, and it may be that we can take care of this acceptance before the end of July, but as matters now stand we will not be able to handle it on the 10th and for that reason we will have to ask you to hold it for the time being. We will expect to pay interest of course.

We believe that you understand conditions here, and will be agreeable in assisting us to this extent, and will be glad to hear from you in the matter at your convenience.

Yours very truly,

Munnell & Sherrill,

By E. J. Munnell.

EJM:D

Mr. BISCHOFF: Letter of June 30, 1920, from plaintiff to defendant. (Produced.)

Offered in evidence, received without objection, marked "Plaintiff's Exhibit Q," and read.

(Testimony of Arthur J. Sherrill.)

Whereupon proceedings herein were adjourned until Monday, June 18th, 2 p. m.

Plaintiff's Exhibit Q

San Francisco, Cal., June 30th, 1920.

Munnell & Sherrill,

40 First St., Portland, Oregon.

Attention Mr. Ed Munnell.

Gentlemen:

This will acknowledge your letter of the 26th inst., regarding the part of your account, which is due for payment and has not yet been taken care of.

We note what you say in reference to the necessity of your obtaining an extension of payment on some of your invoices on the account of your stock having been increased through the return of goods from your various customers who have been unable to meet their payments.

We also note that your bank has refused to extend you further assistance in financing this part of your business. We also notice that they feel Eastern manufacturers should arrange to carry a portion of their customer's obligations due to the fact that Oregon manufacturers have been obliged to accept paper from their trade in the East. We are not as familiar with these conditions as the bank probably is, but we doubt if this condition exists to the extent they would have you believe.

We note that you would dislike sending tires back to the factory but would be forced to do this

(Testimony of Arthur J. Sherrill.)

in case you were not given sufficient time in which to dispose of them. We are today writing the factory and also are enclosing your letter and you will hear from them within the next ten days. The writer is unable to give you definite information on the subject of extensions as this is beyond his authority. However, as mentioned above, we are taking the matter up with the factory and feel sure that they will be inclined to help you in every way within reason.

Trusting that our action in the matter will be satisfactory to you and with our kindest regards, we are,

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

By W. G. Fitzgerald,

Pacific Coast Manager.

WFG RD

Dict. 6-30-20

Monday, June 18, 1923, 2 p. m.

A. J. SHERRILL resumes the stand.

Cross Examination Continued.

Mr. BISCHOFF: In the absence of the original letter of April 5, 1920, I offer in evidence original carbon copy of that letter.

Received without objection, marked "Plaintiff's Exhibit R," and read in part.

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit R

April 5, 1920.

Munnell & Sherrill,
Portland, Ore.

Gentlemen:

Mr. Fitzgerald recently took up with us the matter of an order for Miles & Clarke, also another order which you had taken. In with his correspondence he mailed us copy of one of your letters and we note the conditions under which these orders were delayed, and are sorry to hear of the illness of one of the partners, and trust that by this time he is all right again.

In this letter you mentioned that we were slow in making our reduction a year ago. We believe that you are under the impression that we maintained our old prices a considerable length of time after others had reduced. In this, we think that you will find that you are mistaken, and that while we were a few days late in sending out our printed price lists, you obtained your reduction from the date that it was put into effect by other people. You will appreciate that we might very easily jump at conclusions and arrange a schedule which would go into effect on exactly the same date that everyone else put theirs into effect and which would be arranged without any reference to the other fellows prices. You will also agree that this would be a very foolish thing to do, and something that is

(Testimony of Arthur J. Sherrill.)

not generally done, even by factories that are much larger than we are. As a rule, these price changes start with one or two of the larger makers. While apparently they do not work together, yet at the same time, they seem to know about what the other fellow is going to do; and when the move finally comes, the four or five larger makers are usually on about the same plane so far as changes are concerned. Our method is to wait a few days and see first what the large maker does, and second, what one or two of the makers of high grade tires do, so that when we make our change it may be made intelligently and not be out of line with the proposition of others and be a handicap to our dealers and to ourselves. We believe that you will agree with us that this is the wisest thing to do, even though it does leave you in doubt for two or three days. As a matter of fact, there is little or no business done during the week of any price change, so it doesn't really cut a whole lot of figure anyway.

We telegraphed Mr. Fitzgerald that he might make you certain concessions. We did this largely in view of the conditions as explained to us, and we trust that you will bear this in mind some time when you don't get exactly what you think you ought to have. The price change was delayed for several months after it really should have been made; and practically all of the tire concerns were already using their high priced fabrics and other

(Testimony of Arthur J. Sherrill.)

materials, and we do not know of many that were very keen for additional business at old prices. There is always an opportunity to obtain such business, and we could easily fill the factory up with orders which would take us the better part of the year to complete. We have always tried to be fair with our customers, and believe that the majority of them will say that we are.

We trust that the new connections are going to enable you to greatly increase your business and also your profit. We like to see our dealers make a good profit and grow.

Yours very truly,

The Mohawk Rubber Company.
Sales Manager.

MEM:DH

Mr. BISCHOFF: Letter of July 2, 1920, offered in evidence.

Received without objection, marked "Plaintiff's Exhibit S," and read in part.

Plaintiff's Exhibit S

July 2, 1920.

Munnell & Sherrill,

40 First St., Portland, Oregon.

Attention Mr. A. J. Sherrill.

Dear Al:

This will acknowledge your letter of the 29th inst., and also the letter you received from Miles and Clark.

(Testimony of Arthur J. Sherrill.)

We are sorry that this good customer has experienced a little trouble with the premature wearing of the treads on our 32x4 cord casings, and we feel that it must be on the account of the spinning of the wheels which is very often the case with light cars if they are started quickly.

We can say to you frankly that we are not having any trouble with soft treads and we believe from your own experience you know that in the majority of cases where this has been reported to you that on investigation it was found not to be the fault of the tires.

There was a time when all of the rubber companies experienced more or less difficulty in obtaining the same cure on every tire that they turned out. This was on account of the old type heaters that were being used at that time. However, with the new type of up to date equipment, which is regulated automatically, the danger of over or under cures has been practically eliminated.

Of course, we realize that it is sometimes pretty hard to convince the user that is having trouble with his tires that the fault lies with him and not in the product and in cases of this kind where a customer is obstinate we would suggest that you inform him that it is not necessary for him to accept your word but to also confer with some other reputable concern and obtain their opinion. Sometimes they will do this and then come back and

(Testimony of Arthur J. Sherrill.)

inform you that they have been convinced the mistake was theirs.

We have found in most instances of premature wearing that on investigation it has proven to be the fault of the person operating the car or from a tight brake or faulty clutch. In cases of this kind, there is really no use in adjusting tires at a loss simply to please the customer.

If the tires are not defective, then the thing to do is to help him locate the trouble and thereby eliminate further complaints. By helping him locate his trouble convinces him that you know your business and also prevents him from condemning a perfectly good tire.

We are sorry to know that you have had to take back considerable tires from your customers in lieu of cash. However, we agree with you that it is best for you to have these tires in your store than in some customer's hands who cannot pay for them.

We feel that the general slump in the tire business is about over with us. We know it cannot last indefinitely and we have every reason to believe that during the coming months the general tire demand will be such that it will offset the deficit incurred during the past two months, so we hope that you will continue to exert your usual good efforts behind your tire business and we feel that before the season is over you will have been well repaid for your work.

(Testimony of Arthur J. Sherrill.)

In regard to helping you out on your payments with extentions, as we advised you several days ago this matter has been taken up with the factory and you will hear from them within the next several days. We have every reason to believe that they will be willing to help you out in every reasonable manner, as you have so far handled your obligations satisfactorily and the company will not overlook the fact.

We note with pleasure that you contemplate starting on your trip towards California, either the latter part of this week or the first of next. We also note that you intend soliciting business while enroute and we feel that you will be successful in obtaining some good results.

Your visit to our city is anticipated with much pleasure and we would suggest that while you are enroute you drop us a line and advise definitely just when you expect to arrive.

With kindest regards to yourself and Mr. Munnell, we are,

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

By

Pacific Coast Manager.

Mr. BISCHOFF: We offer in evidence letter of July 8th from plaintiff to defendant.

(Testimony of Arthur J. Sherrill.)

Received without objection, marked "Plaintiff's Exhibit T," and read in part.

Plaintiff's Exhibit T

Akron, Ohio, July 8, 1920.

Munnell & Sherrill,

40 First Street, Portland, Oregon.

Attention Mr. E. J. Munnell.

Gentlemen:

We have received your letter of June 29th, and our San Francisco branch has also referred to us the letter which you addressed to them on June 26th. We realize fully the conditions which you are bucking up against right now, for they are not peculiar to your section of the country, but exist all over to a greater or less extent. However, we believe that we see signs of improvement in the not far distant future. The present condition, of course, has been caused, as you mentioned, by a variety of circumstances.

We note that you believe you can take care of the amount represented by the trade acceptances due July 10th during July and, accordingly, have had our local bank wire for the return of these acceptances, which we shall hold in our files. When payment is made by you, we shall be pleased to receipt and return them.

The rest of your open account at the present time totals something over \$10,000.00, and we

(Testimony of Arthur J. Sherrill.)

believe that the most satisfactory settlement all around would be for you to give us two notes due Aug. 10th and Sept. 10th, respectively, to take care of this balance. This would give us something upon which we could realize, and at the same time allow you the additional time which you need. We are writing our San Francisco branch to make out these notes and forward them to you, as the account is handled on their books.

If the terms which we are outlining are not satisfactory, we shall be willing to alter them in order to co-operate with you, tho the belief of your bank that we are not carrying a load at the present time is not correct, for we assure you that we are all having to face new conditions each day, as well as trying to see what the future has in store.

We really believe, as stated above, that the balance of the season should show a decided improvement, this contention being based on an analysis of the causes which have brought about existing conditions. We certainly hope that this will be the case in the Northwest territory.

Yours very truly,

The Mohawk Rubber Company,
Credit Manager.

BJB:LB

Mr. BISCHOFF: Letter of July 15th offered in evidence, received without objection, marked "Plaintiff's Exhibit U."

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit U

July 15th, 1920.

Munnell and Sherrill,

40 First St., Portland, Oregon.

Gentlemen:

We note copy of a letter written your company under date of July 8th by our Mr. B. J. Brooks, credit manager at Akron, Ohio, which has reference to your unpaid account.

Mr. Brooks has requested that we go over this carefully and send you two acceptances covering this unpaid balance, same maturing August tenth and September tenth. We are, therefore, enclosing two acceptances in the amount of \$4,908.17 each. You, of course, understand these merely cover the unpaid current purchases and do not include invoice No. 1931½, which is covered by separate trade acceptances, one maturing this month, and one in August.

We understand from Mr. Brooks' letter that you intend taking care of your July acceptance on this invoice No. 1931½ some time during the present month and the August trade acceptance covering the same invoice will also be met promptly at maturity. We have, therefore, not included this invoice in the enclosed statement of your account, but you, of course, understand that should these payments not be made the amount of the invoice

(Testimony of Arthur J. Sherrill.)

mentioned would have to be added to the figures on enclosed statement.

Will you please see that the two trade acceptances which we are enclosing are signed and filled out completely across the face of the form on the red lines designated and return them direct to our home office at Akron, Ohio?

Trusting this is clear to you and to your entire satisfaction and assuring you of our kindest regards, we are,

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.
San Francisco Branch.

By Assistant Manager.

CJM:RD

Dict. 7-15-20

Mr. BISCHOFF: I offer in evidence telegram of August 27, 1920, from defendant to plaintiff.

Received without objection, marked "Plaintiff's Exhibit V," and read.

Plaintiff's Exhibit V

Portland, Oregon, 8-27-20.

The Mohawk Rubber Co.,

Akron, Ohio.

We are making every effort to collect money enough to pay Aug. acceptance, but it is hard work. Have more tires in stock now than sixty days ago.

Account returns from dealers would prefer to return some stock to Frisco if agreeable.

Munnell & Sherrill.

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: We offer in evidence letter from Munnell & Sherrill to plaintiff of October 16, 1920.

Received without objection, marked "Plaintiff's Exhibit W," and read.

Plaintiff's Exhibit W

Portland, Oregon, October 16, 1920.

Mohawk Rubber Company,
San Francisco, Cal.

Attention Mr. Fitzgerald.

Gentlemen:

Confirming our phone conversation of today, we believe it advisable to ship at least

75 32 x 4 Cords.

We could also ship:

25 32 x 3½ Cords

25 34 x 4½ "

10 35 x 4½ "

All of the above Non-Skid.

In addition we could ship:

75 32 x 4 Rib Cords

25 32 x 3½ Rib Fabrics

25 32 x 3½ N. S. Fabrics

20 31 x 4 " "

25 32 x 4 " "

10 35 x 4½ " "

You will find that these total approximately \$12,000, and we have cut down on the 32 x 4 Cords

(Testimony of Arthur J. Sherrill.)

and put in enough other sizes to make up the amount, which would still leave us at least twice as many 32 x 4 Cords as we need.

Up to date we have purchased about \$17,000 worth of stock at the new prices and what we wish to do is to apply this amount on our current bills. We have paid off all of the trade acceptances and all that we owe now is at the new price, so quite naturally we are very much interested in knowing just what is going to be done in the matter of rebates, should tires decline.

The conditions here being so uncertain, account of decline rumors, it has stopped tire business altogether, and we feel that this return of stock is the best way for us to reduce our open account on your books. While it is true that none of the large companies have openly come out with a reduction, we have it, on what we consider best authority, that some of them have been guaranteeing a special 25 per cent on Fabrics and 15 per cent on Cords for the past two or three months. This being the case, you can readily see why our tire business has fallen off.

Please get this information to us as quickly as possibly, and oblige,

Yours very truly,

Munnell & Sherrill,

By Sherrill.

AJS:D

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: Letter of October 19, offered in evidence, marked "Plaintiff's Exhibit X," and read.

Plaintiff's Exhibit X

San Francisco, Cal., October 19, 1920.

Munnell and Sherrill,

40 First Street, Portland, Oregon.

Gentlemen:

This will acknowledge your letter of the 16th inst., informing us that you believe it advisable to return 75 32x4 cord casings. We also note the additional tires which you could return if necessary.

In regard to the last paragraph of your letter in which you refer to the possible decline in prices, we wish to advise that so far all information we have received from the factory is contrary to any immediate decline in prices.

We believe that you will note that the different brands of tires that are on the market today at reduced prices are the product of companies whose financial status has been very weak. The majority of these concerns have borrowed money to their limit and in order to obtain additional finances they have sacrificed the profit on their stocks at figures below the cost of production. There will be a good many of these concerns unable to survive the present condition and therefore you will find that after the market has been cleared of these off brand tires it will make the selling of good standard brands a

(Testimony of Arthur J. Sherrill.)

lot easier and we predict that the legitimate tire manufacturers, jobbers and dealers during the coming year will enjoy a better business than ever before.

We would suggest that you have your salesmen begin at once soliciting business on the spring dating plan. We have just started our men out after future business and the terms they are making the dealers are payments in March, April and May. However, we are only accepting spring dating orders subject to any government restrictions and also subject to government taxes. For some time the matter of price protection has been under consideration by the Federal Board of Trade and up until the present date their decision has not been given. However, should they decide that it is not good business to protect customers on purchases then we would be obliged to ship spring dating orders without extending the dealer price protection, and in this event the customer has, of course, the privilege of cancelling his order if he so desired.

At the present time our plan is to guarantee against price reduction up to and including May tenth.

The chances are that if production is restricted the balance of this year the stocks of tires both in the hands of the manufacturers and jobbers will be pretty well cleaned up, that will probably mean that in spite of a large capacity there will not be suffi-

(Testimony of Arthur J. Sherrill.)

cient tires manufactured between the first of January and the first of April to take care of the demand particularly in large sizes. Therefore, we feel that no dealer is taking any chances on placing an order for his spring needs up to any reasonable point.

Every dealer that stays in business will have to have something to sell and he runs no particular chances in purchasing sufficient goods to meet his requirements during the early spring.

We have just received a communication from the factory in which they state that they are shipping about 50 Cord tires, 36x6, to the Atlanta Postoffice. We give you this information as we believe that in trying to interest a new customer it would be well to mention that our tires were given one of the Postoffice awards and this kind of information usually adds considerable prestige to your sales talks, particularly as to **quality**.

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

S. F. Branch,

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:RD

Dict 10-18

Mr. BISCHOFF: Letter of October 21st, offered in evidence, received without objection, marked "Plaintiff's Exhibit Y," and read in part.

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit Y

Akron, Ohio, Oct. 21, 1920.

Munnell & Sherrill,
Portland, Oregon.

Gentlemen:

Through a letter received from Mr. Fitzgerald this morning he states that you are worried over a price change which is slated to take place November 1st. We don't know where all of the dealers get all their information. Certainly they do not get it from manufacturers. It occurs to the writer that this conjecture on their part is due to the fact that Goodrich sent out a letter some months ago guaranteeing their prices against reduction up to November 1st. The reason this letter was sent out was to quiet all of this talk about an immediate and heavy cut in prices and put the dealer in a state of mind where he would feel free to go ahead and buy his ordinary requirements. Their object in writing this was all right, but, apparently, the dealer took it as an advance notice that they intended to reduce their prices on that date.

The writer has not seen or talked with a single tire manufacturer or authorized representative who talks about a reduction in tire prices. The situation is just this: We are all obliged to buy our main requirements of chemicals, rubber and fabric a year in advance of our needs; or at least that has been the case during the last few years,

(Testimony of Arthur J. Sherrill.)

and it has been the custom for many years previous to that, although not quite so necessary.

As a result our costs are practically set when these contracts are placed. They are usually placed in the fall; and the majority of contracts placed for this year's business expire on or about January 1st, 1921. Tire prices have been advanced very modestly. And it is a natural conclusion that those things which advanced the most have got to come down the farthest. Increased production was largely responsible for holding down overheads and keeping tire prices as low as they were in the face of very heavy labor advances, an advance of several hundred per cent in the cost of cotton fabrics and a general advance in everything from shingle nails to machinery.

The situation today is that the manufacturer having bought in anticipation of running his plant at full speed during the present year and having been obliged to reduce his production some months ago, is today either in possession of exceptionally large stocks of his main materials or he has them on contract and is obliged to take them. No manufacturer can stay in business very long unless he makes a profit on his product. And it is not logical to suppose that manufacturers are going to go ahead and make up these raw materials and sell the finished product for less than it cost. And there isn't the slightest question but what, with two ad-

(Testimony of Arthur J. Sherrill.)

vances in labor since last March, with a uniform price on rubber and fabric as established last fall and with no reductions that the writer can think of in the cost of anything that we use so far, that they are going to be in a position to make a general cut.

There are factories who are disposing of excess stocks, obsolete types and even one or two factories who are disposing of their entire stock of finished goods at special prices. Those factories who are disposing of their entire stock of finished goods at cut prices are selling the product for considerably less than it cost them to make, but are in such shape financially that they have got to get money. You note, however, that these same factories have not changed their list prices nor committed themselves for the future.

The situation is exactly the same in the tire business today as it has been in the clothing and shoe business for a year or more. Those items went up away beyond reason. The depression hit them first. As soon as wool and leather dropped people began to look for lower prices on finished goods. They haven't got them yet. The reason is that between the grower of the wool and the hide and the final consumer are a number of people who have to buy well in advance if they are going to stay in business. They have had in their hands stocks of goods which cost them high prices. It is likely that

(Testimony of Arthur J. Sherrill.)

about next summer we may begin to see some real reduction in the cost of these two important items. But most we have seen so far has been in the nature of job lots and sales similar to those in the tire business.

Nobody can prophesy definitely just what is going to happen. If some of the large concerns should cut their list price it would probably mean that everybody would have to. But from what the writer knows of the large concerns, they are just the ones who provided for the big increase and who find themselves embarrassed by large stocks of raw materials at the present time. We have been having this reduction talk ever since last June, but we do not believe any one of the tire manufacturers is in shape to make any immediate cut, unless it is some new concern without material bought ahead; and even then, they would pay far more for fabric on the market today than we pay on contracts of last fall. Rubber can be bought cheaper. Labor has not changed yet.

So far as price guarantee is concerned, we have always protected on goods on hand, unsold, purchased within sixty days of a price change. Whether or not we will continue depends entirely on what the Federal Trade Board decides as to the practice in several lines of merchandise. A complaint was made on the action of some of the tire manufacturers a year ago last May, when a fight

(Testimony of Arthur J. Sherrill.)

developed among some of the larger ones over rebates.

We get absolutely no price protection on anything we buy, neither is dating ever given. We take our chances and use our judgment; sometimes we guess right, sometimes wrong.

Yours very truly,

The Mohawk Rubber Company.

M. E. Mason,

Sales Manager.

MEM:DH

Mr. BISCHOFF: I offer in evidence letter of October 21, 1920, from defendant to plaintiff.

Received without objection, marked "Plaintiff's Exhibit Z," and read.

Plaintiff's Exhibit Z

Portland, Oregon, Oct. 21, 1920.

Mohawk Rubber Company,
San Francisco, Cal.

Attention Mr. W. G. Fitzgerald.

Gentlemen:

We are in receipt of your different letters, and note that you give us no information regarding the disposal of the tires we wish to return and presume that we will hear from the factory direct about this.

When the writer spoke of the order taken from us, he was thinking of the one you took from Seattle and not from Portland. The writer saw Mr. Vogt shortly after your trip to Seattle and he in-

(Testimony of Arthur J. Sherrill.)

formed us that he had placed quite a large order with you for large sized Cords, which is borne out by the fact that we have not received an order for a single tire from Seattle since your trip there. He also informed us that you are consigning the Truck Cords which we take for granted is right or else you would have allowed us to sell them to him per our agreement.

Either way you figure this out, you will have to admit it looks as though we have the goods on you. Now it is a cinch that we cannot afford to be caught here with a big stock of tires and have the price go down on us. It wouldn't help the Mohawk Rubber Company any and it certainly would do us a lot of damage, and had you have turned the order you received from Vogt through us, it would have assisted us very materially in reducing our stock at a small profit. At the same time, it would have done you no harm, as now, we will only have to ship these tires back to you at an actual loss, and you have simply got that many more tires in stock that you wouldn't have had.

We are trying to make the best of an unfortunate situation and had looked to you to help us out rather than injure us, and unless we hear from the factory with instructions as to where they wish these tires shipped, we think it best to ship a large quantity of them to you in San Francisco and have you credit our account for them.

(Testimony of Arthur J. Sherrill.)

Once we get this mess straightened out, we will be in position to make our payments promptly on anything that we order. In the meantime we will welcome any suggestion on your part as the best manner in which to handle this matter.

Yours very truly,

Munnell & Sherrill,

By E. J. Sherrill.

AS:A

Mr. BISCHOFF: Letter of October 30th from the Mohawk Rubber Company, offered in evidence, received without objection, marked "Plaintiff's Exhibit AA."

Plaintiff's Exhibit AA

Los Angeles, Cal., Oct. 30, 1920.

Munnell & Sherrill,

Portland, Oregon.

Attention Mr. A. J. Sherrill.

Gentlemen:

This will acknowledge your letter of the 21st instance which has been forwarded to the writer from the San Francisco Branch.

We note what you have to say in regards to the order taken from The Rubber Service Company on the writer's recent trip to that city. We note what you say in reference to Mr. Vogt having informed you that he placed quite a large order for large sized cord casings. We do not know just what you

(Testimony of Arthur J. Sherrill.)

would term a large order, but if the writer's recollections serve him correctly he believes that the order given by The Rubber Service Company amounted to approximately 32 Cord Casings. The order, that we had the pleasure of taking, for 50 30x31½ N. S. Fabric tires, was turned over to you as you had informed the writer that you were overstocked on this size.. You will also recall having advised that the only sizes you were overstocked on in Cord Tires were 32x4. We note what you have to say in regards to our having consigned Truck Cord Tires to our Seattle distributor. In this connection we beg to differ you as we do not consign tires under any consideration and the tires in the Truck sizes furnished the Rubber Service Co. were invoiced to them in the regular way.

We note what you say in reference to having the goods on us in regard to the order obtained from the Rubber Service Co. We do not quite get your drift in this matter, as you surely do not expect the writer or this company to sell you goods and then resell them for you to our established accounts. We believe that you will agree that our treatment of you has always been fair and square and above board and simply because you purchased tires in excess of your requirements is no fault of ours. We were in no better position to anticipate present conditions than you were and, while we regret that you have been left with an overstock, you

(Testimony of Arthur J. Sherrill.)

will find out that everybody in this business have labored under the same condition.

We have before us a copy of a letter written to you on the 21st instance by our Mr. Mason. In his letter we believe that the situation, as we see it, has been fully gone over and we believe that we are safe in saying that conditions during the early spring of next year will be just the reverse of what they are today. That is, dealers who have sacrificed their stocks and have failed to anticipate requirements for next spring will be found without sufficient tires to meet the demand.

The writer has been spending several days at the Los Angeles branch and has also just returned from a little trip into the territory adjacent to this city and he finds that surplus stocks are fastly diminishing and conditions are now beginning to assume something like normal. He also finds that not a single dealer that he called on was the least pessimistic as to the future. You know from your travels in this particular part of California that there are three dealers to every one in your territory and, naturally, there has been quite a lot of price cutting coupled with the rankest kind of competition. However, we find that the substantial dealers have been able to survive this condition and cannot figure out any reason why dealers of the same class in other territories cannot do as well.

We believe that you mentioned, in one of your

(Testimony of Arthur J. Sherrill.)

recent letters, that you were returning 75 32x4 casings to the San Francisco Branch. We, of course, do not relish the idea of taking back these tires and we believe that the writer explained to you, on his recent visit, that our stock of these sizes was very large. However, if you find it impossible to dispose of same in your territory, then we presume we will have to make the best of it.

We have advised our salesmen to begin the solicitation of spring dating orders and the terms to our dealers will be as follows:

One Third Payment March 10th.

One Third Payment April 10th

One Third Payment May 10th.

The above terms are with trade acceptance subject to 5 per cent on dates of payment or 8 per cent for anticipation on March 10th. We are guaranteeing prices on spring datings up until May 10th. However, the matter of price protection is up before the Federal Committee of Trade Relations and if they advise the manufacturers that price protection is bad business then we will have to abide by their ruling and will withdraw any agreements made in anticipation of future business and the dealers who have placed spring dating orders with us will be advised on the matter and given the privilege of cancelling their order. We expect to receive definite information within a very short time covering price protection and we will then communicate the

(Testimony of Arthur J. Sherrill.)

information to you. Of course you understand that orders taken for future delivery will also be subject to any Governmental ruling and tax in effect on the date of shipment. We would suggest that you have your salesmen start soliciting spring business at as early a date as possible and you, of course, can extend to your dealers the same protection which we are giving you, but be careful to have your salesmen impress upon the dealer that should the Federal Committee of Trade Relations request the rubber manufacturers to withdraw price protection then any previous agreements along this line will be considered void. Of course if price protection is withdrawn it will be no fault of this company's. It will simply be a ruling that all tire manufacturers will have to abide by and if it goes into effect we will, as mentioned above, communicate with you accordingly.

With kindest regards and trusting that business in your territory is showing a material improvement, we are,

Yours very truly,

The Mohawk Rubber Co. of N. Y. Inc.

By W. G. Fitzgerald,

Pacific Coast Manager.

Mr. BISCHOFF: Letter of November 1st, offered in evidence, received without objection, marked "Plaintiff's Exhibit BB."

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit BB

Los Angeles, Cal., November 1, 1920.

Munnell & Sherrill,

Portland, Oregon.

Attention Mr. Munnell.

Gentlemen:

This will acknowledge your letter of the 26th instance which has been forwarded to the writer from our San Francisco Branch.

We note what you say in reference to not having received information from us regarding the surplus stock which you wish to return for credit. We did not know that you had a surplus stock which you wished to return with the exception of some 32x4 Cords about which we have had considerable correspondence. We believe that you will recall having told the writer, on his recent trip, that you were not overstocked on a single size with the exception of 32x4 Cords, so therefore, we have taken it for granted that the returned stock of this size would relieve you of that part of your obligation which seemed to be an inconvenience.

You probably know that we do not accept returned goods to offset current accounts or obligations incurred on the basis of a straight sale. We are always glad to help out our distributors by exchanging sizes for those that are moving more rapidly and in some instances a charge of 5 per cent is made for rehandling and so forth. It is too

(Testimony of Arthur J. Sherrill.)

bad that you did not know exactly what you wanted to do when the writer was last in Portland, then this matter could have been settled one way or the other as it is necessary for such things to be referred to the factory and this requires time.

If you desire immediate action on this matter our suggestion is that you send us a list of what you wish to return and upon its receipt it will be relayed on to our factory and they will write you direct, giving their disposition in the matter.

Yours very truly,

The Mohawk Rubber Co. of N. Y. Inc.

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:MH

Mr. BISCHOFF: I offer in evidence telegram from the defendant to plaintiff of November 3rd. Received without objection, marked "Plaintiff's Exhibit CC."

Plaintiff's Exhibit CC

Portland, Ore., 11-3-20.

The Mohawk Rubber Co.,
Akron Ohio.

Are ready to return sufficient tires to cover open account as agreed with Fitzgerald, but at his suggestion have held these for shipping instructions from factory, if Branch stock do not warrant return at this time we will warehouse at no expense

(Testimony of Arthur J. Sherrill.)

until you wish them shipped, absolutely necessary we get account straightened out at once.

Munnell & Sherrill.

Mr. BISCHOFF: I offer in evidence telegram from plaintiff to defendant, November 4th. Received without objection, marked "Plaintiff's Exhibit DD."

Plaintiff's Exhibit DD

Akron, Ohio, 11-4-20.

Munnell & Shirrell,

Portland, Oregon.

Your wire third. Hold tires. Writing today.

The Mohawk Rubber Co.

Mr. BISCHOFF: Letter of November 4th, offered in evidence, received without objection, marked "Plaintiff's Exhibit EE," and read.

Plaintiff's Exhibit EE

Akron, Ohio, Nov. 4, 1920.

Munnell & Sherrill,

40 First St., Portland, Oregon.

We have just gotten your telegram of Nov. 3rd, and wired you, in reply, to continue to hold the tires. The bulk of the tires which you wished to return were covered by a shipment made to you last spring, on which we gave you the benefit of old prices, as a special favor, as you were very anxious to secure the goods. The shipment of this order, as you may or may not know, cut into our

(Testimony of Arthur J. Sherrill.)

stock considerably, so that we were obliged to make other customers wait.

Of course, at that time, you could not tell what you were going to be up against the balance of the year. However, it is a fact that had we had the tires, we would have disposed of them then at new prices, or doubtless have gotten rid of them before now. Later in the season, of course, you did offer to return them to us, but at that time we did not need those sizes so badly, and the stock of our San Francisco Branch right now is in such condition that were they to take them back, they would have an abnormal quantity of certain sizes and would doubtless have difficulty in disposing of them for some time.

The billing of these tires to you at old prices gives you a differential of 15 per cent on which to work, and in offering them for sale at this percentage under the present list, as you have done, you have maintained your normal percentage of profit. We feel that you should dispose of them somehow at a greater reduction, if necessary, in order to turn them into money, immediately, with which you can liquidate your account with us. This procedure would also eliminate the large expense incident to returning the tires for credit, which, as stated above, we do not want you to do.

You not only have Portland in which to work, but your entire territory, and it seems only reason-

(Testimony of Arthur J. Sherrill.)

able to us that if you present them for sale at a sufficiently attractive price, you should be able to dispose of them without much difficulty. Conditions are dull, we will grant, but you must admit that the public will always fall for a chance to save money, and you can certainly locate enough buyers right now to absorb the stock which you have on hand.

At this time, we are feeling the pinch of conditions just as much as you are, and it is no easier for us to bear the burden of this investment than it is for you. What we would like to do is to have the tires turned into Cash.

Very truly yours,

The Mohawk Rubber Company.

B. J. Brooks,

Credit Manager.

BJB:LB

Mr. BISCHOFF: Letter of November 4th offered in evidence, defendant to plaintiff, received without objection, marked "Plaintiff's Exhibit FF."

Plaintiff's Exhibit FF

Portland, Oregon, Nov. 4, 1920.

Mohawk Rubber Co.,

Akron, Ohio.

Gentlemen:

We enclose you herewith copy of our wire of last night, and acknowledge receipt of yours in return, asking us to hold tires.

(Testimony of Arthur J. Sherrill.)

It might be well at this time to explain this matter fully to you, which is as follows:

This summer, when business was very slack, and we found we were going to be over-stocked on certain sizes of tires, we went into the matter with your Mr. Fitzgerald, and made arrangements with him to return sizes we were long on to San Francisco in payment of open account invoices. In that way, we could cut the price, which we did, selling practically all of our tires at the old price instead of the new.

We made one shipment of tires to San Francisco and was ready to make another shipment, when Mr. Fitzgerald requested that we hold it up, and await shipping instructions from the factory, as he thought possibly the factory would wish to have some of the tires sent to other branches, as the San Francisco Branch was pretty well loaded up on all sizes. We did not receive any shipping instructions from you people, and, after taking up the matter with Mr. Fitzgerald again, and receiving nothing definite, got in touch with him by long distance, and told him that we wanted to do something immediately regarding our stock, and he promised he would let us know something definite just as soon as he could get word to the factory. However, as nothing more was done regarding it, we wired you last night, as per enclosed copy.

As the matter now stands, we have sold these

(Testimony of Arthur J. Sherrill.)

tires at the old price, with the definite understanding that we were to pay for them with tires from our stock, and unless this is done, our tire business will show us a nice loss. If the stocks at the different branches are such as it would not be advisable to ship any more from our stock, we would be very glad to warehouse these tires here, without any expense to yourselves, until such a time as we would draw on them, or you would want them shipped to other branches, you to credit our account with whatever tires we set aside.

As we wired you, it is necessary that we get this matter adjusted at once, and we trust that you will make some arrangement to handle it in a manner that will let us out without loss.

Yours very truly,

Munnell & Sherrill,

By A. J. Sherrill.

AJS-D

Enc.

Mr. BISCHOFF: We offer in evidence letter of November 4th to the San Francisco branch. Received without objection, marked "Plaintiff's Exhibit GG."

Plaintiff's Exhibit GG

Portland, Oregon, Nov. 4, 1920.

Mohawk Rubber Co.,

San Francisco, Cal.

Attention Mr. Fitzgerald.

My Dear Fitz:

Your letter written from Los Angeles just re-

(Testimony of Arthur J. Sherrill.)

ceived, and we can find nothing in it that alters the situation whatever. The fact remains we had a very definite agreement with you, by which we were to sell tires at the old list irrespective of the sizes, and in turn we were to exchange such of our stock that we were long on in payment of same.

We had been enjoying quite a nice business from Seattle, which meant we were reducing our stock at a small profit, and whipping it into better shape when you came north. The result of your northern trip was, since then we have not received an order from Vogt for one single tire, so that any orders for tires that he gave you then, or since then, means just that much money taken from us, which we could have used in squaring our account with Mohawk. Furthermore, on the strength of exchanging stock, we have sold practically all of our tires at the old price, which would mean that, if we did not return this stock, or else be credited with it at the new prices, we would show a loss of approximately 20 per cent on practically all of the new stock we have sold.

It is true we are not alone in this matter, and that other dealers as well as the factory, all made the mistake of overloading, but that does not help us out. We have gone ahead in this matter, with the assurance from you that we could return this stock, and we believe it is the only way out of it. We could do this: you give us credit on our open

(Testimony of Arthur J. Sherrill.)

account for such tires as we wish to return and we will warehouse them here for you, without any expense to you, and if business takes a turn for the better, we could draw on this stock, as needed, or ship to your orders.

We received a very lengthy letter from Mr. Mason, in which he assured us that tires were not going to decline. In addition, we spent something like \$9.00 telephoning to you, only to have tires decline a day or two later. Either the factory is not very well posted on conditions, or else they were not giving us the straight dope. We do not believe they would knowingly give us the wrong information, and will take it for granted the big fellows are putting over something that the little ones are not let in on.

We are writing the factory today regarding the disposition of these tires, and trust that we will receive something definite from them within the next few days. In the meantime, with the Republican Administration, we look for things to pick up, and it is possible we will be able to sell all of our stock at a high price, and thereby avoid returning any of them.

With best wishes,

Yours very truly,

Munnell & Sherrill,

By A. J. Sherrill.

AJS:D

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: We offer a telegram from defendant to plaintiff. Received without objection, marked "Plaintiff's Exhibit HH," and read.

Plaintiff's Exhibit HH

Portland, Oregon, 11-8-20.

The Mohawk Rubber Co.,
Akron, O.

Our letter 4th inst. covers situation fully and we see no other solution but to return stock per original agreement with San Francisco, have been using old price list all summer but public not interested in our tires at any price just now, and see no relief for some time to come. Wire reply.

Munnell & Sherrill.

Mr. BISCHOFF: Telegram November 9th, from plaintiff to defendant, offered in evidence, received without objection, marked "Plaintiff's Exhibit II," and read.

Plaintiff's Exhibit II

Akron, Ohio, Nov. 9, 1920.

Munnell and Sherrill,
Portland.

We have no intention of allowing return of your entire stock and letters written by Frisco do not indicate any such agreement we will do all we can to help you but it's up to you to help yourself also goods were shipped on signed orders not on consignment Fitzgerald figures on seeing you in about ten days better await his call.

Mohawk Rubber Co.

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: Letter of November 9th from the Mohawk Company, offered in evidence, received without objection, marked "Plaintiff's Exhibit JJ," and read.

Plaintiff's Exhibit JJ

Akron, Ohio, Nov. 9, 1920.

Munnell & Sherrill,
Portland, Oregon.

Gentlemen:

This will acknowledge receipt of your letter of November 4th addressed to us here, also your letters of October 21st and October 26th addressed to San Francisco, copy of which Mr. Fitzgerald has sent in. Shortly after your letter of the 4th came in we also received another telegram from you. This telegram seemed to insist on an agreement with Mr. Fitzgerald through which you are able to return your entire stock to us as an offset to your current account. A careful review of all the correspondence which has passed between us and Frisco, between Frisco and you and between you and us, does not indicate any such agreement. And we haven't the slightest intention of letting any customer dump his entire stock upon us and ship his entire burden to us.

In the first place, we are not responsible for the fact that you have an overstock, except that we shipped the goods on your signed order. Practically your entire stock was bought at old prices

(Testimony of Arthur J. Sherrill.)

and in selling at old prices to the consumer you are not cutting your price nor assuming any part of the necessary effort to bring your stock down to a normal condition. You are merely giving up the speculative profit which you figured on and which is entirely responsible for the present condition of affairs with you.

We believe that you will admit that these are facts. We have not attempted to dress them up in nice words; but we believe the time has come when we have to insist on some of our rights also. Had everything come out as you planned it in the spring we would probably both of us be rejoicing. The fact that it did not come out that way is to regretted; but there is no particular use in spending our time blaming each other for the condition, but rather if a certain amount of effort is put forth your tire stock can be moved by you without any particular loss to either of us. Supposing you sell out some of your stock at what it cost you and turn it into money. That is what other dealers are doing with other lines of tires. It looks to us as if you were not willing to cut your own profit in the least, but were willing that we should take the whole burden. You realize that we went to some trouble and expense to show our good will toward you last spring. The writer recalls very distinctly an urgent message from San Francisco and another from you with reference to certain orders which

they were anxious we should accept at old prices. We accepted those orders at old prices and took from branches and other customers the goods to fill them. Your customer was, apparently, speculating at the expense of somebody else and dumped the greater part of the goods back on your hands. Now after the season has entirely gone by we are asked to accept these goods again for credit; and as we understand it, you are not asking for credit at the prices at which they were paid for, or should have been paid for, but are asking for credit at a price which will show you a profit on the transaction. In other words, we have got to take goods that we made a year ago out of lower priced material and absorbing all the expense in connection with the exchange. That doesn't look like a fair deal to us.

We wish to say that you are the only distributor that we have on our books that has become involved in this sort of a proposition. We have taken a very few goods back from certain distributors for exchange for more popular sizes. This, we are willing to do. But we have not been asked in a single instance to accept the return of a man's whole stock or to exchange month after month goods to the amount of his entire purchases for the month, or to exchange repair materials for tires and in other ways add to our loss.

We felt last fall when we started to do business with you that we were going to be able to develop

(Testimony of Arthur J. Sherrill.)

a very satisfactory and a mutually profitable connection. But it looks to us as if it would have been much better for us had we had no connection at all in this section of Oregon for the present season.

We have carried this account and assisted you in every way possible and we are still willing to do what we can to ease you out of this situation. But we do object most strenuously to your dumping the whole mess on us and claiming agreements which the correspondence shows clearly were never contemplated nor made.

We wired you today the substance of the above.

We are also advised by Mr. Fitzgerald that he figured on being up in your section the latter part of the month. And we believe that it would be better to let matters rest as they are until you can talk this matter over further with Mr. Fitzgerald.

We are inclined to think that recent changes in prices on the part of one or two manufacturers are a disturbing element. You will note, however, that in no instance have prices gone back to where they were last spring and that even if prices should decline, you would still own your goods for less than you could replace them for under the new schedule.

Now do not think that we do not appreciate and sympathize with you in your predicament, because we do. If we did not we would have long ago forced complete settlement. We do, however, feel that you are losing your nerve and becoming panic-

(Testimony of Arthur J. Sherrill.)

stricken just at the time when the outlook begins to change for the better.

Yours very truly,

The Mohawk Rubber Company,

M. E. Mason,

Sales Manager.

MEM:DH

Mr. BISCHOFF: Letter of November 10th, offered in evidence, received without objection, marked "Plaintiff's Exhibit KK."

Plaintiff's Exhibit KK

San Francisco, Cal., Nov. 10th, 1920.

Mr. A. J. Sherrill,

Munnell and Sherrill,

Portland, Oregon.

Dear Al:

Your letter of the 4th inst. came this morning and its contents have been noted. The writer believes that in his recent letters he has gone over the situation covering your surplus stock and does not know of anything further he can say on the subject. We have told you that the matter of your returning stock for credit, that is to offset your debits, is entirely up to the credit department at Akron and we believe they have written you on the subject.

You must not forget that the writer's authority with this company is limited to certain matters, such as the selling of goods, territorial arrange-

(Testimony of Arthur J. Sherrill.)

ments and etc., but when it comes to credits, return of unsold merchandise and things of that caliber, then you are dealing with our credit department, because after we have made a sale of goods, then the matter passes out of our hands into those of the credit department at Akron, and we have no authority to take action on matters pertaining to their department.

Al, you seem to be worrying considerably about the business the writer obtained from Rubber Service Co. and which could have been turned over to you. We believe that it has been heretofore mentioned that we did turn over to you their order for fifty 30x3½ N. S. fabric casings and the balance of their order which amounted to about thirty cords were of sizes which you just about had a decent stock of and therefore we could not see the necessity of taking these off your hands. Anyway, do you think that it is right to expect us to load up our established customers with stock that you bought at old prices and by doing so sacrifice the additional profit which we are rightfully entitled to? No, we don't believe if you were in our position you would consider such action good business. We, of course, regret that you have more tires than you seem able to move rapidly. We also have more tires than we ordinarily like to carry, and there are hundreds of other concerns in the same boat, and the only logical thing to do is to make the best

(Testimony of Arthur J. Sherrill.)

of the situation and bear in mind that the present condition is only temporary and that with the coming of next spring there will be a lot of concerns that in their anxiety to unload, sacrificed their stocks and wish they had not done so, because there will be a greater shortage of tires during the coming year than was ever before known. The distributor that does not anticipate this condition is going to be caught with a stock inadequate to meet his customers' requirements and will have no one but himself to blame.

The writer returned several days ago from Los Angeles and while down there came in contact with some pretty big factors in the tire game and found these men were exactly of the same opinion as that of the writer concerning a scarcity of tires during the coming year. These distributors have their men out getting spring orders from their better accounts and with the smaller ones they are not doing much worrying, because they know that even though the smaller ones do not come into the fold, they will be able to get along very well with the business they obtain from the better accounts, whose volume will in some instances double what it has ever been before.

We advised you sometime ago that our men are out after spring business, and judging from the war orders coming in here, they are not having the least bit of trouble obtaining this business, and

(Testimony of Arthur J. Sherrill.)

one good reason for it is because the average dealer is now delightfully glad to hook up with a line that has not been jazzed by a bunch of cut rate pirate outfits. Your men should make no bones about telling your dealers that Mohawk was one of the lines that survived present year conditions. We had all the chance in the world to sell our entire stock to some of these cut rate tire outfits by just cutting the price about 15 per cent. Did we do it? I should say we did not, and the consequences are that the dealers are already beginning to find it out and are showing our product a respect that money wouldn't be able to purchase. We closed a deal several days ago with one of the largest and most substantial tire concerns in Fresno, which as you know is the dumping ground for tires of the lowest grade. However, in face of this situation the concern that took our line stated they were thru with jazz tires and in the future would devote their efforts to quality merchandise, and in selecting Mohawk they knew they were getting a line second to none in quality and one which would not fall into the hands of unscrupulous dealers. Of course it has always been our policy to be careful as to the kind of dealers or distributors that handle our line, nevertheless we appreciate the compliment paid us by the Fresno concern, as now we know the trade are beginning to recognize these features and this will develop into an asset for us.

(Testimony of Arthur J. Sherrill.)

We recommend that you retain any surplus stock that you might have at the present. You are going to need this stock sooner or later and then you'll be glad that you held on to it. Your men will soon begin to send in spring dating orders and really should be obtaining right now their share of this business. You have to have stock to fill these orders and your surplus will take care of them in part, so write to our factory and tell them what you want in the way of extensions. If they are reasonable, then you can rest assured the request will be given favorable consideration. They do not expect you to do the impossible, they only feel that you should bear your part of the burden and in the meantime do everything within your power to reduce your stock along legitimate lines.

With kindest regards and best wishes, we are,

Yours very truly,

Mohawk Rubber Co. Inc.

S. F. Branch,

W. G. Filtzgerald,

Pacific Coast Manager.

Mr. BISCHOFF: I offer a telegram of November 10th. Received without objection, marked "Plaintiff's Exhibit LL."

Plaintiff's Exhibit LL

Portland, Oregon, 11-10-20.

The Mohawk Rubber Co.,

Akron, O.

Have no desire to return stock, which will in-

(Testimony of Arthur J. Sherrill.)

voice thirty-five thousand but enough to reduce our open account and relieve us of our over supply, certain sizes, this is according to agreement with Fitzgerald and we request quick action.

Munnell & Sherrill.

Mr. BISCHOFF: Telegram of November 11th, offered in evidence, received without objection, marked "Plaintiff's Exhibit MM."

Plaintiff's Exhibit MM

Qr Akron Ohio Nov 11 1920

Munnell and Sherrill

Portland.

Have no record of agreement to accept additional sizes nor has Fitzgerald as indicated by his recent letters to you. Please wait for our letter November ninth. Don't worry about reduced prices. Very little chance of our reducing below to even to old list. Neither will other companies.

Mohawk Rubber Co.

Q. (Mr. Bischoff) Mr. Sherrill, after you came to this point in the correspondence that we have just come to, the fact is that Mr. Fitzgerald did come to Portland and had an interview with you in reference to that situation, didn't he?

A. He did, yes, sir.

Q. And that was some time during the latter part of November, 1920?

A. Yes, sir.

Q. Now without going into lengthy detail of

(Testimony of Arthur J. Sherrill.)

everything that transpired, the result of that interview was that you definitely settled your arrangements with the company up to that time?

A. Well we made a new deal regarding the tires that we were to keep.

Q. Now then as far as the indebtedness was concerned, you arranged between you that you were to send back part of the stuff that you wanted to send back, some six thousand or sixty-five hundred dollars' worth, and to give five notes that have been spoken of here, and that would wind up the entire indebtedness up to that time. Is that correct?

A. Well the arrangements were that we were to send back a certain number of tires. We were to keep a certain amount on spring dating terms, giving notes for the same with protection of spring dating orders.

Q. Let's see if you don't understand what I want. As far as the payment of the account, as I said, up to that time that was concluded by the taking of five notes, and sending back of the six thousand or sixty-five hundred dollars' worth of tires. Didn't that wind up the entire affair?

A. Well I am not so familiar with the amount, because I am not familiar with that end of it. Mr. Munnell and Mr. Auspach would know more about the amounts than I would. In fact, the arrangement that we made, we were to return a certain amount of tires and keep a certain amount on giv-

(Testimony of Arthur J. Sherrill.)

ing the five notes in payment for same, with spring dating terms on these five notes.

Q. These five notes covered the entire balance of the money that you owed them?

A. I believe it did.

Q. You know it did, don't you? That wiped your slate clean at that time?

A. I am reasonably sure, I think that was the amount.

Q. Now at that time did you give Mr. Fitzgerald any order for any new merchandise?

A. I really couldn't say.

Q. You know you didn't give him any order for merchandise at that time, don't you?

A. No, I wouldn't know that.

Q. Didn't you conduct these negotiations with Mr. Fitzgerald when he was here?

A. Well I conducted them with Mr. Munnell, my partner. We were all together in the office.

Q. You did the major portion of this; you were the one he looked to for determination of this matter?

A. I made the original arrangement with Mr. Fitzgerald in July, in San Francisco.

Q. Have you any record here which will show whether you placed any new orders for future shipment, at that interview in the latter part of November, 1920?

A. I couldn't tell you myself.

(Testimony of Arthur J. Sherrill.)

Q. Have you any records here which will show that?

A. Mr. Fitzgerald might have got an order from Mr. Auspach or Mr. Munnell. He may have said you need so many tires—

Q. Mr. Sherrill, won't you please listen to what I ask you and save time. Have you any records here which will tell whether you placed an order at that time or not?

A. I don't know.

Q. You don't know whether you have any records here of that kind or not?

A. I don't.

Q. What do you mean by the terms Spring dating orders?

A. Just what the factory states in their letters.

Q. Now see if I have that correct. A Spring dating order is an order for the purchase of merchandise which is to be shipped at once upon the giving of the order, or within a short space of time thereafter, but the payment for the merchandise is to take place some time in the future, in the Spring and succeeding year. Isn't that what is meant by Spring dating order?

A. I presume that it is, something along that line.

Q. You know that is what is meant?

A. Different concerns have different ways of giving dating orders.

(Testimony of Arthur J. Sherrill.)

Q. Mr. Sherrill, I am not speaking about other concerns. I am speaking about your relationship with this plaintiff. Isn't that what you and Mr. Fitzgerald understood by Spring dating orders?

A. Yes, I believe it was something like that.

Q. Now the fact was, if you didn't place any orders for merchandise at that time, you didn't have what was known as a Spring dating order with this factory, did you?

A. Well you could call it anything you wanted to. We had protection on that order.

Q. On what order?

A. On that amount of goods, on those notes. We were protected against decline on those notes—on the account of that merchandise.

Q. Now this merchandise which you were paying for by means of those five notes and the return of some merchandise in par, the fact is that you had bought that merchandise over a period of more than a year prior to the time you were arranging this matter with Mr. Fitzgerald. Isn't that right?

A. Some of it had been bought considerable time, yes, sir.

Q. Yes, some of it more than a year before that?

A. I couldn't say as to the exact time.

Q. But you know that some of it had been a long time before?

(Testimony of Arthur J. Sherrill.)

A. Yes, some of it was approximately a year old.

Q. And when you made these purchases which led up to a balance in November, 1920, you gave your trade acceptances for these purchases, didn't you?

A. Possibly we gave trade acceptances for some. Mr. Munnell always handled our acceptances and signed the notes.

Q. Isn't it a fact that long before your arrangement with Mr. Fitzgerald, these trade acceptances which you had given had all gone to protest?

A. I don't believe they had all gone to protest.

Q. Some of them had?

A. There may have been some on the point of our having to take stock back.

Q. Well some of them went to protest at any rate. That is right?

A. I believe it is.

Q. And a large part of your open account was past due. That is correct, isn't it?

A. Well I don't know just what amount—yes.

Q. I am not asking a definite amount, but please state whether any amount.

A. Well some of it past due, yes.

Q. All your account past due?

A. Yes.

Q. And it was to pay off those trade acceptances

(Testimony of Arthur J. Sherrill.)

and this past due account that these notes were given, wasn't it?

A. Yes.

Q. Now Mr. Sherrill, do you recollect or can you state from your own recollection what your purchases were for the months, or approximately what your purchases were, for the several months prior to November, 1920?

A. I could not.

Q. Have you any record here from which you could give the amount of your purchases month by month for the several months prior to November, 1920?

Mr. LILJEQVIST: We will have a witness who will be able to give you that. The bookkeeper.

Q. I want to call your attention, Mr. Sherrill, to a record of your purchases from the plaintiff. We have it on our records. See if that will refresh your recollection in respect. This record shows that in November, 1920, you bought \$166.23 worth of merchandise. Does that aid your recollection any? Do you know whether that is substantially correct?

A. I wouldn't be able to say.

Q. You wouldn't be able to say in respect to any one of these?

A. No, I would not.

Q. Well we will come to that later, then. Now after this interview with Mr. Fitzgerald and your arrangement with him to handle that matter upon

(Testimony of Arthur J. Sherrill.)

the basis outlined, you did send back a quantity of tires to San Francisco amounting approximately to \$6000.00 and somewhat over?

A. Yes, sir.

Q. And you did in fact sign five notes?

A. Yes, sir.

Q. And the three notes that this action is based on in part, are three of those notes that were a part of the settlement?

A. Yes, sir.

Q. Now in sending those notes to the plaintiff either at Akron or San Francisco, did you say anything in any letters about the Spring dating arrangement?

A. I didn't send the notes myself, someone else in the office sent the notes.

Q. Who was it?

A. I presume that Mr. Munnell sent the notes.

Q. Do you know whether he had said anything in that respect?

A. I do not.

Q. Did you give any instructions to anybody to communicate to plaintiff anything about Spring dating arrangements such as you have spoken of here?

A. I did not personally.

Mr. BISCHOFF: I offer in evidence letter of December 2nd from defendant to plaintiff, which was identified.

(Testimony of Arthur J. Sherrill.)

Marked "Plaintiff's Exhibit NN" (previously identified as Plaintiff's Identification 2).

Plaintiff's Exhibit NN

Portland, Oregon, Dec. 2, 1920.

Mohawk Rubber Co.,

San Francisco, Cal.

Attention Mr. Fitzgerald.

Gentlemen:

We succeeded in getting off on steamer Alaska yesterday 165 32x4 Casings, and we trust they reach you on schedule, and in good order.

We enclose memorandum invoice to cover, together with serial numbers of the tires returned.

We also enclose five notes, covering the balance of the account, as per November 1st statement, these notes totaling \$13,166.79. This amount has been arrived at as follows:

November 1st statement	\$20,409.77
Less frt., as per Expense Bills at- tached	\$ 245.98
Less advertising signs, Boise and Portland	88.30
Less the tires returned.....	6,908.70
	<hr/> 7,242.98
Total.....	<hr/> \$13,166.79

We have thought it advisable to split this balance five ways, for the reason that there will be little

(Testimony of Arthur J. Sherrill.)

likelihood of our realizing much on tires until after February 1st.

Trusting this reaches you before you leave for the factory and wishing you a pleasant and successful trip, we are,

Yours very truly,

Munnell & Sherrill,

By E. J. Munnell.

Portland, Oregon, Dec. 1, 1920.

Sold to

Mohawk Rubber Company
San Francisco, Cal.

Terms: Net

Boat

30 32x4 N. S. Fabrics....\$46.80 \$1,404.00

498314 518433 533827

498501 517980 533766

499277 518781 533792

499880 518956 533946

498940 518916 533828

502794 518943 533854

503177 518841 533829

503149 518829 534023

509392 517288 534021

518718 492967 533964

75 32x4 N. S. Cords..... 66.85 5,013.75

527434 546898 545038

527689 545107 544972

527413 546141 546031

528490 546230 545665

(Testimony of Arthur J. Sherrill.)

527600	546710	544977	
527412	548187	545337	
527659	545417	545183	
528496	546527	546552	
545468	545102	546895	
545101	545628	506898	
544914	545058	507255	
546882	545558	506872	
544927	546535	507001	
546783	546052	506897	
545534	544910	507136	
507046	527701	505996	
507050	607713	500729	
506830	506724	500397	
528196	505924	506136	
526802	506777	506982	
527716	507111	505886	
526010	506439	497080	
527641	491211	491266	
527506	505884	496082	
528508	507003	496889	
60	32x4 Rib Cords	65.35	3,921.00
530578	529944	545946	
544846	530505	544729	
546151	546035	529233	
507188	545604	645614	
529193	544638	544828	
545671	529787	544924	
547884	545950	529578	

(Testimony of Arthur J. Sherrill.)

544732	544987	546173
529375	544709	545332
545493	529996	544831
545100	545667	528779
545090	545141	545712
529577	546768	548923
546823	545368	545074
544771	545799	545033
545070	546844	546160
545242	546611	546221
546152	545034	545243
546068	546202	545967
545832	546150	645928

	\$10,338.75	
25-10-5 per cent		\$6,579.73
Tax		328.97
		<hr/>
		\$6,908.70

Q. These five notes representing \$13,166.00 that we have been speaking about?

A. Yes, sir.

Q. Now was there any other communication that you know of which was forwarded by your office to the plaintiff in which any mention at all was made of this Spring dating proposition you have been talking about here?

A. Not to my knowledge was there anything for some little time after that.

(Testimony of Arthur J. Sherrill.)

Mr. BISCHOFF: Letter of December 8, 1920, offered in evidence and marked "Plaintiff's Exhibit OO," without objection.

Plaintiff's Exhibit OO

San Francisco, Cal., December 8th, 1920.

Munnell and Sherrill,

40 First Street, Portland, Ore.

Gentlemen:

This acknowledges Mr. Munnell's letter of December second, enclosing a list of the casings returned for credit, also five notes liquidating your November first balance, said notes maturing February tenth, March tenth, April tenth, May tenth, and June tenth, of 1921.

If the casings returned check out as you have listed them and we find the freight bills to be subject to allowance, we believe that with these notes your account will be in balance up to November first and should there be any difference upon checking this up we will be prompt to advise you.

With many thanks for the prompt manner in which this was handled, we are.

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

Assistant Manager.

CJM:RD

D 12-8

Mr. BISCHOFF: Letter of December 16, 1920,

(Testimony of Arthur J. Sherrill.)

offered in evidence and marked "Plaintiff's Exhibit PP," without objection.

Plaintiff's Exhibit PP

Akron, Ohio, December 16, 1920.

Munnell & Sherrill,

40 First St., Portland, Ore.

Attention Mr. Munnell.

Gentlemen:

We were glad to receive from our San Francisco branch, the other day, the notes which you sent them to adjust your account to November 1st. We have been pleased to apply them to the credit of your account. Mr. Fitzgerald says that you hope to anticipate some of these notes, if your spring business picks up as it should.

We notice that you only include interest at the rate of 6 per cent; whereas we have been obliged all year to pay 7 and 8 per cent to discount such paper. We know that it is not your desire to put us to an additional expense in this connection, and are therefore charging to your account an amount of \$46.79, which we figure is one per cent more, taking into consideration the maturity dates of the notes.

The tires which you have returned have, of course, not been received as yet, but we trust that they will come in in good shape, and we shall credit your account promptly.

We certainly regret all of the trouble which has been experienced by everybody concerned this year,

(Testimony of Arthur J. Sherrill.)

but we are confident that next season will see the tire business much more nearly normal, and we hope that a situation such as existed this year will never again arise.

Yours very truly,

The Mohawk Rubber Company,

B. J. Brooks,

Credit Manager.

BJB:LB

Mr. BISCHOFF: I offer in evidence letter of Munnell & Sherrill of December 20, 1920.

Offered in evidence, received without objection, marked "Plaintiff's Exhibit QQ."

Plaintiff's Exhibit QQ

Portland, Oregon, Dec. 20, 1920.

Mohawk Rubber Co.,

Akron, Ohio.

Attention Mr. B. J. Brooks

Gentlemen:

We are in receipt of your favor of the 16th, and note you have received the notes which we forwarded to San Francisco to apply on account, and that same have been placed to our credit.

Also have your request that interest rate on these be changed to 7 per cent instead of 6 per cent as written. Our reason for writing these notes at 6 per cent was, that on looking back we find where you had previously made the interest charge to us at 6 per cent rate, and we took it for granted money

(Testimony of Arthur J. Sherrill.)

was just as plentiful in your country as ever. The additional charge will be agreeable, under the circumstances, and we can assure you we will use our very best efforts to anticipate the payment on these notes, if it is possible to do so.

Business during the month of December has dropped considerably below the same month in past years, and while the outlook is none too bright, we hope for the best.

With best wishes for the coming holidays and thanking you for past considerations, we are,

Yours very truly,

Munnell & Sherrill,

EJM-D

By E. J. Munnell.

Mr. BISCHOFF: At this time may it please the Court, I am going to ask leave to amend our complaint by interlineation, to have the prayer read: "Interest at the rate of seven per cent per annum," in accordance with these letters. I have referred the matter to Mr. Liljeqvist, and he is agreeable.

Q. Mr. Sherrill, after you gave these five notes, it is a fact, isn't it, that you offered to turn over some \$4000 or thereabouts, or Liberty Bonds, to be applied in part payment or liquidation of your account, provided the plaintiff would accept these bonds at par or face value?

A. I believe Mr. Munnell would be more familiar with that than I.

Q. Did you write any letters of that kind?

(Testimony of Arthur J. Sherrill.)

A. I don't recall writing any. Discussion came up regarding that. I believe we tendered them Liberty Bonds at one time or another, yes.

Q. You wanted them to take them at their full value, full face value?

A. I don't recall the exact conditions, but possibly that was true.

Q. You recall, don't you, that plaintiff refused to accept them unless they were taken at the market value?

A. Yes, I believe so.

Q. Now you made that request to Mr. Fitzgerald, didn't you, that he take these Liberty Bonds, as well as writing direct to the company?

A. Well I presume that we did.

Mr. BISCHOFF: Letter of February 5, 1921, offered in evidence, received without objection, marked "Plaintiff's Exhibit RR."

Plaintiff's Exhibit RR

San Francisco, Cal., February 5th, 1921.

Munnell & Sherrill,

40 First Street, Portland, Ore.

Gentlemen:

Regarding your recent offer to turn over to us a number of liberty bonds we beg to advise that we took this matter up with the factory and are this morning in receipt of a letter from them stating that they could only agree to take these bonds at market value, which would really be no better than

(Testimony of Arthur J. Sherrill.)

you could sell same thru your local bank.

The factory states that they have already disposed of considerable bonds and would not like to take any additional bonds at par value, speculating on their future advance. Furthermore they would probably not hold them if they did take them, as they will only yield from 5 to 5½ per cent, which is not as much as it would really cost to borrow the money.

Very truly yours,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:RD

Dict. 2-5.

Mr. BISCHOFF: I offer in evidence letter of February 9th, defendant to plaintiff.

Received without objection and marked "Plaintiff's Exhibit SS."

Plaintiff's Exhibit SS

Portland, Oregon, February 9, 1921.

Mohawk Rubber Co.,

San Francisco, Cal.

Attention Mr. Fitzgerald.

Gentlemen:

We have your letter of the 5th, with regard to your factory's decision on the Liberty Bonds, and we regret to learn that they will not be able to

(Testimony of Arthur J. Sherrill.)

handle these except at market value.

As the matter stands with us today, we see no other way for us to handle any portion of the notes which are coming due this month and March, as we are doing no tire business at all. It has been raining continually since the first of the year, and the tire business has not picked up in the least, in fact, our general business is away below what it should be at this time of the year.

Conditions may change materially as soon as we get some automobile weather, but in any case we would not get returns until May and June, so it does not look very promising for money from us any ways soon. If the factory can find a way to realize on these bonds at face value, we will be glad to turn them over to apply on account, at any time.

Yours very truly,

Munnell & Sherrill,

EJM

By E. J. Munnell.

Mr. BISCHOFF: Letter of February 11th, offered in evidence, marked "Plaintiff's Exhibit TT," without objection.

Plaintiff's Exhibit TT

San Francisco, Cal., February 11, 1921.

Munnell and Sherrill,

40 First Street, Portland, Oregon.

Gentlemen:

This acknowledges Mr. Munnell's letter of February 9th, and in reply we are indeed sorry to hear

(Testimony of Arthur J. Sherrill.)

that conditions are so bad in and around Portland, tho, of course, we realize fully that there is a general business depression throughout the county.

As for being able to take these liberty bonds in the future, we will have to submit your letter to our Eastern office and if they have any suggestions we are asking them to write to you.

Very truly yours,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

CJM:RD

Assistant Manager.

Dict. 2-11

Mr. BISCHOFF: We offer in evidence letter of February 11th to San Francisco.

Received without objection and marked "Plaintiff's Exhibit UU."

Plaintiff's Exhibit UU

Portland, Ore., February 11, 1921.

Mohawk Rubber Co.,

San Francisco, Cal.

Attention Mr. Fitzgerald.

Gentlemen:

One of the notes which we sent you in the fall and which was payable on February 10th, was presented to us yesterday for payment, and we were obliged to let it go to protest, and be returned to Akron.

We did not suppose the factory would send it through without advising us a few days ahead of

(Testimony of Arthur J. Sherrill.)

time, so there was nothing to do but ask to have it returned.

As explained to you in our letter of a few days ago, it is not a question of our selling the tires at a price, we simply cannot interest any one with conditions as they have obtained in the last few months, and our general business is very quiet, we aren't selling enough other merchandise to permit us to use the proceeds to liquidate our tire bills.

Needless to tell you that we are doing our best to move the stock, and while conditions are discouraging, we are not disheartened and really believe that with good weather we will sell some tires.

We have not written the factory direct, as we wanted you to add your comments to this letter, knowing as you do what we have been up against this winter. Trusting they will appreciate our position, we are,

Yours very truly,

Munnell & Sherrill,

By E. J. Munnell.

Mr. BISCHOFF: We offer letter of February 17, 1921, defendant to plaintiff.

Received without objection, marked "Plaintiff's Exhibit VV," and read in part.

Plaintiff's Exhibit VV

Portland, Oregon, Feb. 17, 1921.

Mohawk Rubber Co.,

San Francisco, Cal.

(Testimony of Arthur J. Sherrill.)

Attention Mr. W. G. Fitzgerald.

My Dear Bill:

I enclose you a small order for repair stock.

In this connection will say that we have re-arranged our uptown store and now have the vulcanizing shop ourselves, having got rid of the man who was renting from us. We have a good vulcanizer lined up; one who has also had selling experience, and I believe that we can build up a very nice vulcanizing business from this store, which will mean the sale of considerable more repair material for us.

Things have certainly been on the bum in this territory and today is the second day that it hasn't rained or snowed since sometime last fall. There hasn't been a thing doing in any line and we have been forced to sit here and watch ourselves losing money every day.

We have re-arranged our salesmen, having brought George into Portland, giving him part of Dingman's territory and putting Ding on everything south of Portland, including Klamath Falls and Marshfield. Our deal with the U. S. man did not materialize, as, while he was anxious enough to take the job, he was in no position to finance himself, and we certainly could not afford to gamble on him, so we thought it best to make two big territories out of it and keep our old salesmen on. There isn't any question but what both Ding and

(Testimony of Arthur J. Sherrill.)

George can make us some money this coming year in the territory as it is now lined up, and if it gets exceptionally good and business warrants it, we can always shorten up and put on another man.

We regret very much not being able to take care of Mohawk's note, but it was the only thing that we could do under the circumstances, and even now should business get good, it will, no doubt, be sixty to ninety days before we will reap the benefits as far as actual cash coming in is concerned.

It is too bad that we can not get them to accept our Liberty Bonds as that would help us out materially. Of course if we wanted to let go of our salesmen and make no effort to build for the future we would have several hundred dollars every month to the good, but we don't feel that this would be the proper course to pursue as we have faith in the future and want to be prepared to get the business when it does come.

The bank is very nice to us about extending our notes, but will not let us have any additional money to pay off these bills with, as they maintain it is up to the factories to help carry the load.

If you have not already done so, I wish you would again take up the matter of Liberty Bonds with the factory and see if they cannot take at least part of what we have.

You said something on your last trip about getting a better deal for us on repair materials and

(Testimony of Arthur J. Sherrill.)

we wonder if anything has been done in the matter. As it now stands, we don't break even on it where it is sold at the quantity price and it would seem that should get at least 20 per cent better than the minimum. There is not much inducement to sell goods on a 10 per cent margin when it costs you about 12 per cent to do business. See if there is some way to make it attractive to sell the line.

With best regards to yourself and Mac, I am,

Yours very truly,

A. J. Sherrill.

Liberty Bonds Owned by Munnell & Sherrill,

Portland, January 18, 1921

Two \$100 bonds, First Liberty Loan Con- verted	\$ 200.00
Two \$100 bonds, Second Liberty Loan Con- verted	
Two \$50 bonds, Second Liberty Loan Con- verted	300.00
Four \$50 bonds, Third Liberty Loan Con- verted	
Five \$100 bonds, Third Liberty Loan Con- verted	700.00
Two \$50 bonds, Fourth Liberty Loan Con- verted	
Thirteen \$100 bonds, Fourth Liberty Loan Converted	1,400.00
Two \$50 bonds, Victory Liberty Loan Con- verted	

(Testimony of Arthur J. Sherrill.)

Fourteen \$100 bonds, Victory Liberty Loan

Converted 1,500.00

\$4,100.00

Mr. BISCHOFF: Letter of February 21st offered in evidence, received without objection, marked "Plaintiff's Exhibit WW," and read in part.

Plaintiff's Exhibit WW

Akron, Ohio, Feb. 21, 1921.

Munnell & Sherrill,

40 First St., Portland, Ore.

Gentlemen:

Our San Francisco Branch has sent us copies of the letters which you sent them recently. The notes which you gave us were discounted at once and we did not think that it would be necessary to call them to your attention, not realizing that you would be unable to meet that due Feb. 10th. We are sorry that it had to go to protest, for this reflects against us as well as you and each case such as this is held as an example by bankers who naturally are trying to eliminate such occurrences.

As it is, we have journaled to your account an item of \$2,633.36, plus interest of \$33.74.

We are very sorry to learn that the weather has been so miserable in your part of the country recently. It certainly seems as tho it would have to improve soon. Tire conditions, in general, are working in the right direction and there is every

(Testimony of Arthur J. Sherrill.)

indication that there will be an actual shortage of tires in the summer all over the country. The reserves have been nearly exhausted and manufacturers have not been in a position to make as many as they have in past years.

We are surprised to have you think that we could accept Liberty Bonds at par value. If we could do this, we could make a lot of money right now, buying them at the present market and disposing of them. As for keeping them ourselves, this is impracticable, for no one knows just how soon they will be worth par, and the interest return which we would get from such Bonds is not as great as the amount we are obliged to pay our banks right now on borrowed money.

We believe that the thing for you to do is to sell a sufficient number of your bonds at the present market to meet the amount of the note which has just gone to protest. You will have to take a loss, but you can make this up to a large extent, if you wish, by buying the Bonds back later in the season, when conditions have improved. To be sure, Bonds will probably be higher, but we do not think that they will reach par for several years.

We cannot consider an extension on the note, for we have already discounted all of the paper which the banks here can accept, and what we need right now is cash. We appreciate fully your present predicament and regret that conditions are as

(Testimony of Arthur J. Sherrill.)

they are. However, it is up to each of us to finance his own business somehow during the present crisis and we think that we have already gone a long way in granting you the concessions which we have during the past year.

We believe you should not feel pessimistic over the future, even tho at present it is hard to see signs of improvement. We do not see how conditions can be otherwise, for tires are a present day necessity, just like clothes, and it is an actual fact that the supplies of the country are nearly exhausted.

Will you please let us have your check for the above amount plus the small balance due on your current account. We regret that you will have to take a loss, but we believe that the only thing for you to do is to sell your Liberty Bonds now and buy them back again later if you wish.

Very truly yours,

The Mohawk Rubber Company,

By B. J. Brooks,

BJB:LS

Crdt. Manager.

Mr. BISCHOFF: Letter of February 23rd, received without objection, marked "Plaintiff's Exhibit XX," and read in part.

Plaintiff's Exhibit XX

February 23, 1921.

Munnell & Sherrill,

40 First St., Portland, Ore.

(Testimony of Arthur J. Sherrill.)

Attention Mr. Sherrill.

Gentlemen:

This will acknowledge your letter of the 17th inst., also your order No. 63 for repair materials. We are glad to see this order as it is a good reminder of the time when we were hearing from you most every day.

We note with interest that you have re-arranged your uptown store and have taken over the vulcanizing shop. We are glad that you took this action, as the writer has felt all along that this shop should be under your supervision.

We note that business in your territory is still quiet and that weather conditions have played their part in holding back the sale of tires. The chances are that since you have had such bad weather up there this winter that a very hot summer will follow. If such is the case, the tire business will boom as hot weather makes tires blow out and we presume that about 60 per cent of the tires in service in that territory are on the verge of cutting loose most any time.

We note that you have brought George into Portland, giving him part of Dingman's territory, and putting Ding south of Portland, including the Klamath Falls territory and Marshfield. If you have brought George into Portland, we are curious to know who is going to cover Boise and the other Idaho territory. We wish that you could get Ding

(Testimony of Arthur J. Sherrill.)

and George interested in the sale of repair materials. These boys are certainly passing up a good bet in not going after this line of business, as in a good many cases it is the stepping stone to orders for tires and this is really what you are after.

We believe, Al, if you would personally spend a day or two in the territory with each of these men that you could show them how to turn the trick. You know as well as the writer that the sale of our repair materials is like taking candy away from a child, and we believe if your men can once be made to understand this that they would then exhibit the proper effort.

We note what you say in reference to your Liberty Bonds and your inability to take care of your recent note. We have again taken this matter up with the factory and it is possible that we will hear from them the early part of this week. Just as soon as we do we will communicate with you further.

Regarding the last paragraph of your letter in which you state that the writer mentioned on his recent trip something about giving you a better deal on repair materials. We don't know where you got this idea, as you are absolutely receiving the best price that we are able to extend. It is possible that what you have reference to is the new price list that we are using amongst the retail trade. We were under the impression that some of these

(Testimony of Arthur J. Sherrill.)

had been sent to you. However, we are enclosing with this letter several copies of the new list and if you have not yet received a supply, let us know and we will furnish you with what you desire. Of course, you understand that the prices on the other list in your possession will apply on your orders, but in soliciting business amongst your trade, the list for you to use is the one we are enclosing, which when taken as a whole nets you a longer margin of profit.

As to the ten per cent trade discount which you have been receiving from us: This discount will stand as it is. We have nothing better to offer and it is the same discount that is being extended to our various jobbers throughout the country.

With kindest regards to yourself and Mr. Munnell, we are,

Very truly yours,

Mohawk Rubber Co. of N. Y. Inc.
San Francisco Branch,

WF:RD

Pacific Coast Manager.

Dict. 2-21

Mr. BISCHOFF: I offer in evidence letter of March 12th, 1921, from Munnell & Sherrill.

Received without objection, marked "Plaintiff's Exhibit YY," and read in part.

Plaintiff's Exhibit YY

Portland, Oregon, March 12, 1921.

Mohawk Rubber Co.,

(Testimony of Arthur J. Sherrill.)

Akron, Ohio.

Attention Mr. Brooks.

Gentlemen:

After reading your letter of March 2nd, it occurs to us that you have the wrong impression with regard to several matters. In the first place, we are not asking you to take back any stock excepting it would reach a point where we would be unable to pay you, then we know of no other alternative than to return stock for what we would owe you.

As far as making an effort to sell tires, we are offering them at 30 and 5 per cent off which would seem to be low enough if there was any demand. As we informed you before, when we did sell, we have found it almost impossible to collect. In one case we had to take an automobile, and another, a vulcanizing outfit, and a great many cases the tires were returned to us. So we have certainly had our share of trouble as far as the tire game is concerned.

Now as to Liberty Bonds, which you suggest our selling, we have already used these as security at the bank and they are unwilling to release them unless we could show them where we could dispose of them at par, so that proposition is taken care of by your refusing to accept at other than market value. So under the circumstances, the best we can do is to force our collections as hard as possible

(Testimony of Arthur J. Sherrill.)

and trust to business improving, which we feel sure it will just as soon as the weather gets settled, but even under the most favorable conditions, we can not hope to have very much money until long toward June or July.

We arranged to take care of the March note and will take care of all open accounts promptly in the future, but it will be absolutely out of the question for us to meet the April note, so would ask that you arrange to take care of it accordingly.

While we are long on certain sizes, we are short on others and are going to have to order from time to time, and for these sizes and repair materials, we will expect to settle each month.

To give you a sample of what we are up against we are enclosing you a letter from what has been our best customer, who is now discontinuing the line and is giving his reasons. You will note also that we have been carrying a few tires with them on consignment. Would ask that you kindly return this letter to us for our files.

Trusting you will be able to handle this April paper as we have asked, we are,

Yours very truly,

Munnell & Sherrill,

AJS:A

By A. J. Sherrill.

Mr. BISCHOFF: I offer in evidence letter of May 27, 1921, defendants to plaintiff. Received without objection, marked "Plaintiff's Exhibit ZZ."

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit ZZ

Portland, Oregon, May 27, 1921.

Mohawk Rubber Co.,

Akron, Ohio.

Att'n Mr. B. J. Brooks.

Gentlemen:

In reply to your favor of the 21st, we have received the new lists and are beginning to get some action on our stock of Mohawk Tires. We are not making any money on them, but realize that now is the time to get them off our shelves and are using every effort to turn them into money.

We expect to be able to handle the note that is coming due on June 10th, and will continue to whittle down until we are on an even keel with Mohawk, when all of us will be in a better frame of mind.

Have had just one week of fair weather and it has been a great incentive to buyers, and from now on the sailing should be much easier.

Yours very truly,

Munnell & Sherrill,

EJM:HAA

By E. J. Munnell.

Q. Now Mr. Sherrill, the lists that are referred to in this letter those are the communications of May 10th that have been offered in evidence, in which the decline of price was announced. Is that right?

(Testimony of Arthur J. Sherrill.)

A. I couldn't say for sure. Who wrote the letter, who signed it?

Q. Mr. Munnell.

A. I wouldn't be able to say about that.

Q. You don't know?

A. No, I don't know.

Q. I call your attention to letter of May 27, 1921. That is Exhibit 4, and signed Munnell & Sherrill, by HHA. Who is that?

A. Mr. Auspach.

Q. Your clerk or bookkeeper?

A. Bookkeeper.

Q. What is his office, bookkeeper?

A. Bookkeeper.

Q. Now with that you sent a list of tires—inventory of tires on hand May 14, 1921. Now that list represented the tires which you had in your possession, didn't it?

A. I presume that it did.

Q. Did you have anything to do with the preparation of that list?

A. No, I did not.

Q. You are unable to state definitely what that represents?

A. I couldn't state definitely, no, sir.

Q. Did you in your business keep a record of the purchase of your tires so that you could, by referring to the serial number, ascertain when it was bought?

(Testimony of Arthur J. Sherrill.)

A. Yes, I believe that we could. I think our stock cards would show.

Q. Well you know that you kept such a record, don't you?

A. I believe that is the way they keep them, yes.

Q. And so that it was possible from—by reference to the records of your office, to ascertain when any particular tire was obtained?

A. Yes, sir.

Q. That was necessary, wasn't it, for one thing, in order to make adjustment for defective tires? Someone came in with a tire and claimed they hadn't received proper service out of it, and you could check back on it?

A. That was one of the reasons, I believe.

Q. That made the keeping of such records necessary?

A. Yes, sir.

Q. Another reason, Mr. Sherrill, for keeping records of that kind, was for the purpose of adjusting for defects, wasn't it?

A. Yes, several reasons.

Q. And also to enable you to check back with the factory for rebate?

A. Well I presume that is possibly one of the reasons. There are several reasons for keeping records.

Q. That was one of the reasons, wasn't it?

A. Sometimes we use that system, sometimes

(Testimony of Arthur J. Sherrill.)

we don't. There were times when he didn't give the serial numbers.

Q. Did you see this list that accompanied the letter of May 27, before it was sent?

A. I don't recall now whether I did or not. I wouldn't say that I did.

Q. Did you take any active part in supervising, getting together the data and information from which that was compiled?

A. At the present time I don't recall taking an active part.

Q. Was it submitted to your inspection before it was sent?

A. It may have been.

Mr. BISCHOFF: May we have the letter of June 2, 1921, please.

Mr. LILJEQVIST: I don't find it.

Mr. BISCHOFF: We will offer the carbon. That letter is not here. (Previously offered as Defendants' Exhibit 5.)

Q. Now referring to your letter of June 2nd—letter which you received from the plaintiff—did you see this letter?

A. Yes, sir.

Q. Did you do anything about procuring the serial numbers that they requested, to enable them to check back what if anything you were entitled to in the way of rebate?

A. I didn't do anything myself. I believe that

(Testimony of Arthur J. Sherrill.)

there was a list of serial numbers sent to them.

Q. You believe there was?

A. I don't believe that I had anything to do with it.

Q. Did you give any instructions for the preparation of such a list?

A. I don't believe I had anything to do with it. I don't recall that I did.

Mr. BISCHOFF: I offer in evidence telegram defendant to plaintiff, dated August 5, 1921.

Received without objection, marked "Plaintiff's Exhibit AAA," and read.

Plaintiff's Exhibit AAA

Portland, Oregon, 8-5-21.

Mohawk Rubber Co.,

Akron, Ohio.

Collections have not permitted our sending any check as yet.

Munnell & Sherrill.

Q. Now from that period of time after you received the announcement in the decline of price of May 10th, your account with the plaintiff again began falling very badly in arrears, didn't it?

A. I couldn't state the exact condition of it, but I presume it was in arrears at times.

Q. Well you know that your notes had all come back protested, don't you?

A. No, I don't. I believe that some were paid.

Q. You know some of them did?

(Testimony of Arthur J. Sherrill.)

A. Some of them were paid, I believe.

Q. Two of them had been paid?

A. Yes.

Q. And the other three had been put through and had come back protested?

A. I am not familiar with that part of it.

Q. At any rate you know they were not paid?

A. I know they were not paid at that particular time.

Q. Don't you know those three notes were never paid?

A. Were not paid at that time.

Q. Were they ever paid?

A. Paid in settlement, later.

Q. I know; that is what we are disputing about here, this settlement; but did you pay these notes as they were presented to you, when they fell due?

A. I couldn't state whether we did or not. I presume we didn't, on part of them. We did on some, and some I presume we didn't.

Q. You know you didn't pay three of them when they fell due?

A. Was three of them I believe that wasn't paid.

Q. You know that your open account was past due?

A. I am not sure as to that. Mr. Munnell or Mr. Auspach would know a great deal more about that than I do.

Q. Well, you know as a fact that you had con-

(Testimony of Arthur J. Sherrill.)

siderable correspondence with the plaintiff regarding these old accounts?

A. Most of it would be between Mr. Munnell and the Mohawk Rubber Company.

Q. By that you mean that Mr. Munnell wrote the letters?

A. I am out of town a great deal, and he looks after that part of it.

Q. Didn't you know that letters were being received and sent?

A. Yes.

Q. And being exchanged in reference to the account. That is true, isn't it?

A. No doubt they were.

Q. And you know it to be a fact that you complained continually about your inability to meet them, due to conditions that existed at that time?

A. Yes, we complained about conditions.

Q. And then this unsatisfactory condition continued on up until about the early part of September, 1921?

A. Well it continued practically throughout the time that we had the line.

Q. And right on to September, when Mr. Fitzgerald came here and had an interview with you, didn't it?

A. We never did have any satisfactory conditions.

Q. Well now, finally the plaintiff did make ar-

(Testimony of Arthur J. Sherrill.)

rangements with another dealer to sell Mohawk tires here, didn't it? You know that?

A. Yes.

Q. Now referring to the incident that led up to that arrangement, isn't it a fact that Mr. Fitzgerald came up here from San Francisco to arrange for that?

A. I don't know that he came up to arrange for that. He arranged for it while he was here. Whether he came up for that purpose or not I don't know.

Q. Didn't he tell you that he had received a telegram from Mr. Cassidy asking him to come up here to talk over that proposition?

A. He didn't say he had received a wire from Mr. Cassidy. He told me Mr. Cassidy had called on him in San Francisco.

Q. Well, at any rate, whether called or wired, you knew that he came here at Cassidy's request, didn't you?

A. No.

Q. Didn't know that?

A. No, I did not.

Q. Now referring specifically to the interview with Mr. Fitzgerald which resulted in the termination of business relations between you and the plaintiff in September. I want you to get your mind fixed on that interview. Do you know what day that took place?

(Testimony of Arthur J. Sherrill.)

A. It was about September 10th, I presume, around the early part of September.

Q. I want to call your attention to the letter of September 18, 1921, in which you were given certain instructions with respect to turning over merchandise. Does that refresh your recollection as to the date when Mr. Fitzgerald had the interview with you leading up to the making of that letter?

A. It would, yes.

Q. Can you state now, with that letter and that date in mind, when that was?

A. It was about a week before that time. I can't state the exact date, but it was about that.

Q. Isn't it a fact it was about two days before the making of that letter?

A. No, it was I think about a week before that time.

Q. That is your best recollection?

A. My best recollection.

Q. Where was this interview held?

A. In our office First and Ash.

Q. Who was present at that interview?

A. Mr. Munnell and Mr. Auspach.

Q. And Mr. Fitzgerald?

A. And Mr. Fitzgerald.

Q. What was the first thing that was spoken of in respect to this relation?

A. The matter of pneumatic truck tires.

Q. State anything that was said at that inter-

(Testimony of Arthur J. Sherrill.)

view, who said it, what Mr. Fitzgerald said and what you said, and what everybody else said upon this subject of your relationship. May I ask you at this time not to tell us what you thought, or what you believed or felt, but tell us what was said, as near as you can recall it.

A. Mr. Fitzgerald told me about Mr. Cassidy calling on him at San Francisco, and said that he thought he could sell Mr. Cassidy truck tires; that we were not doing very much with the truck tire line, and I agreed with him that we were not. We discussed the matter for a few minutes; he said—something was said about him getting Cassidy for a distributor. I told him at that time that I thought Mr. Cassidy was tied up with the General, and that it would be impossible for him to get him. He said no, that he thought different. He thought Mr. Cassidy was about through with the General, and would be open for a proposition.

Q. At this point I want to ask you, did Mr. Fitzgerald tell you at that time that he had already seen Cassidy before he saw you?

A. As near as I can recall it, he spoke only of seeing him in San Francisco.

Q. I mean in Portland.

A. No, not in Portland.

Q. All right. Go on.

A. That is as near as I recall; and we discussed the matter generally further, and finally the propo-

(Testimony of Arthur J. Sherrill.)

sition came up of him securing Cassidy, with our consent, providing that he would relieve us of our stock, and he asked me if that would be satisfactory.

Q. Who said providing he relieved you of your stock?

A. Mr. Fitzgerald.

Q. You mean to say that he suggested to you first of all—that he was the first one to make the suggestion that you were to be relieved of the stock?

A. He made that suggestion to me.

Q. That is, he volunteered that suggestion?

A. He volunteered that suggestion.

Q. Did he say he would relieve you of all your stock?

A. Relieve us of all our stock.

Q. That is all he said?

A. This, as I recall it, is what he said—that he would relieve us of our stock.

Q. Did you understand that it meant your entire stock?

A. Well I could have taken it that way. He said he would relieve us of our stock.

Q. Very well. What did you say to that?

A. He asked if I would object if he would do that. I told him no, that I would not; if he would relieve us of our stock it was agreeable that he would transfer the account. He asked me then

(Testimony of Arthur J. Sherrill.)

what Ed would say about it, and I told him he would have to ask him; he was right there in the next room.

Q. Didn't I understand you to say Mr. Munnell and Mr. Auspach were there at that interview?

A. The door was open between the two rooms. It is an open office.

Q. Then as I understand you now, the conversation was between Fitzgerald and yourself, but Mr. Munnell and Mr. Auspach were in an adjoining office with the door open?

A. There is no door between the two offices. It is open, and they are both very small.

Q. A partition between them, with an open door?

A. Partition without any door, no top over it.

Q. You don't know whether they were taking note of this conversation or not, do you?

A. Well they could hear every word that went on.

Q. That is, they could hear if they would pay attention to what you were saying?

A. Yes.

Q. If otherwise engaged would probably not know what transpired, as far as you know?

A. Wouldn't be any reason why they shouldn't hear anything that was going on.

Q. Then this conversation was between you and Fitzgerald, and when he asked you if it would be agreeable to Munnell, you referred him to Munnell?

(Testimony of Arthur J. Sherrill.)

A. Munnell, as I recall it, was standing in the door when the remark was made; standing in this open door.

Q. Did he then come in and join the conversation?

A. He did, yes.

Q. Now what was said after he came in and joined the conversation?

A. Mr. Fitzgerald asked him what he thought about it, and Mr. Munnell said he was agreeable providing he took the stock. From that conversation I—from his reply I would take it for granted that he had overheard the conversation.

Q. So that in the first instance, in the conversation with you, Mr. Fitzgerald volunteered the condition providing they would relieve you of the stock, but when Mr. Munnell came in and he was asked whether it would be agreeable to turn over the account to Cassidy, Mr. Munnell said providing they take over the stock?

A. Yes, sir.

Q. Now did you regard that proposition as being settled right then and there?

A. No, because Mr. Fitzgerald, as far as I knew, had made no arrangement with Mr. Cassidy.

Q. Well then, what further was said on that subject, if anything?

A. He said that he would see Cassidy and see what could be done. He thought he could line him up.

(Testimony of Arthur J. Sherrill.)

Q. Now was that all of the conversation that took place at that interview?

A. That was the sum and substance of it, there was other conversation, of course.

Q. Isn't it a fact, Mr. Sherrill, when Mr. Fitzgerald first approached you on this subject matter that he didn't merely come right out and say, "Well, we would like to make a change." Didn't he tell you that the factory had become dissatisfied with the condition of your account, and that he had instructions to make some change?

A. He did not.

Q. He didn't tell you anything about that?

A. No, sir.

Q. Was anything said about the factory being dissatisfied about the account?

A. The only thing that was said was that we were not selling any pneumatic truck tires, and he asked if it would be agreeable to have Cassidy sell the pneumatic truck tires.

Q. That is the only complaint he made?

A. That is the only complaint he made.

Q. Didn't make any complaint about the condition of your account at all?

A. To the best of my knowledge was nothing said at that time about the account.

Q. Of course Mr. Fitzgerald was very kindly disposed towards your firm during all the time you did business together, wasn't he?

A. I think he was, yes, sir.

(Testimony of Arthur J. Sherrill.)

Q. And the fact of the matter is that he was frequently trying to get the factory to make concessions for you and do things for you that he couldn't do himself?

A. We expected him to help us out wherever he could.

Q. And whenever a situation arose where you needed some assistance which you were not actually entitled to, you looked for Fitzgerald to go to the bat for you, as one of your letters indicates?

A. We expected him to help us out whenever he could.

Q. And Mr. Fitzgerald did frequently urge his house to make you concessions, didn't he?

A. I presume that he interceded for us at times.

Q. You know he did, don't you? You say presumed. You know that to be a fact, don't you?

A. In certain cases, yes.

Q. You know it was not a pleasant proposition for Mr. Fitzgerald to tell you that they would have to sever the relationship between your firm and his firm?

A. Mr. Fitzgerald never told us that.

Q. Didn't tell you that at all?

A. Never at any time.

Q. Well the substance of the conversation, of that first interview, was in a mild way advising you that they couldn't continue to do business with you?

A. Was no intimation whatever.

Q. Very well. Let's come to the second inter-

(Testimony of Arthur J. Sherrill.)

view; after you had this first talk, he was to see Cassidy, is that right?

A. Yes, sir.

Q. How soon after that did he return—did you have another talk?

A. Well it was approximately, as I recall it, a week later. I believe that Fitzgerald went to Seattle in the meantime. I am not certain, but I believe he went to Seattle and returned to Portland.

Q. With reference to the letter of September 18th, about how many days before that was this second interview?

A. It was the day before—that would have been I believe on September 17th.

Q. Well you heard nothing further, of course, in the meantime, between those two conversations, as to what was to take place?

A. No, as I recall it, Mr. Fitzgerald didn't return until—

Q. Who was present at this second interview?

A. Second interview?

Q. Yes.

A. Mr. Auspach and Fitzgerald and myself.

Q. Were you all actually in the room, or were you in separate offices, as you explained before?

A. Well it is pretty much in one office. There wasn't any particular interview at that time, except, as I recall it, Fitzgerald came in and said that he was going to be able to get Cassidy.

Q. Did he say whether he was going to get him

(Testimony of Arthur J. Sherrill.)

to handle the entire line, or only the truck tires?

A. The entire line.

Q. Now was anything further said about that subject by anybody?

A. I presume there was some discussion about it, naturally.

Q. Do you recall what was said, or the substance of what was said?

A. We discussed the stock that was on hand.

Q. Who spoke about that?

A. Probably both spoke of it—all three of us. We were all three together in the office.

Q. What did you say about it?

A. We took the stock.

Q. I beg pardon?

A. We took stock.

Q. You took stock?

A. Yes.

Q. What do you mean by that?

A. We went out in the store and took the number of tires that we had on hand.

Q. Well what did you take that from, from your records?

A. No, from the tires.

Q. Counted the number of tires?

A. Counted the number of tires.

Q. Who did that?

A. Mr. Fitzgerald and I.

Q. Where were your tires, in racks there on the place?

(Testimony of Arthur J. Sherrill.)

A. Some on the first floor in racks, and some of them piled up on the second floor.

Q. Just you and Fitzgerald did that?

A. Just Mr. Fitzgerald and I, yes.

Q. Did you make a record of that stock taking?

A. We did.

Q. Have you got that record here?

A. I believe they have the record; approximately the same as the tires turned over to Cassidy.

Q. Have you that inventory here that you made at that time?

A. The inventory was taken down, as I recall it, on pieces of paper.

Q. Mr. Sherrill, can't you answer that question? Did you bring it here?

A. Yes, we have—

Q. Let's have it please.

Mr. LILJEQVIST: The two of them took it down on tags. (Handing paper.)

Q. Is this the inventory that was taken down at that time?

A. It is the inventory.

Q. Was that written just as you went along with Mr. Fitzgerald?

A. No, it was not. It was written on small slips of paper and afterwards copied on this.

Q. Who copied it on this?

A. Mr. Fitzgerald.

Q. Is that Mr. Fitzgerald's writing?

(Testimony of Arthur J. Sherrill.)

A. Yes, it is.

Q. Now this stock taking that you referred to has to do with tires that you had in this place at First and Ash, did it? You had another place of business at Broadway and Ankeny?

A. A small retail store.

Q. You had a part of the Mohawk tires over there?

A. A very small number of tires there.

Q. No stock was taken as to that part?

A. No, sir.

Q. I notice the description of the tires in ink, and then apparently some prices in lead pencil. Are the lead pencil prices in Mr. Fitzgerald's handwriting?

A. They are not.

Q. Those were placed on there later by someone else?

A. Yes, sir.

Q. Someone in your office probably?

A. Yes, sir.

Q. But you made no effort to ascertain with Mr. Fitzgerald the stock that was over at Broadway and Ankeny?

A. That stock was not involved.

Q. The total of all the stock that you—this has not been tabulated, has it?

A. That was just for the purpose of giving us an idea of the stock that Mr. Cassidy would receive.

Q. After you took this stock with Mr. Fitzger-

(Testimony of Arthur J. Sherrill.)

ald what was said with respect to relieving you of the stock?

A. Well Mr. Fitzgerald stated he would give us a letter or authority for turning the stock over to Mr. Cassidy. As soon as he gave us that we were to allow Mr. Cassidy to send down and get the stock.

Q. When was this talk about turning over to Cassidy? I understood at the interview he undertook to relieve you of your stock. That was the first interview, is that right?

A. Yes.

Q. When did he first speak to you about Cassidy taking this stock?

A. When he was talking about turning it over to Cassidy from the start.

Q. I asked you, Mr. Sherrill, to tell us all the conversation that took place, and you didn't say anything about Cassidy being involved in that. You say now that Cassidy was mentioned about taking this stock, in the first interview. Is that what you want us to understand now.

A. I presume it was.

Q. You presume. Do you know whether or not it was?

A. He was to relieve us of our stock and turn it over to Mr. Cassidy.

Q. Did he say that to you?

A. He did.

Q. When?

(Testimony of Arthur J. Sherrill.)

A. At both interviews.

Q. At the first interview you didn't know whether he was going to be able to get Mr. Cassidy as an agent?

A. Providing he got Mr. Cassidy he was to turn this stock over to Mr. Cassidy. That was understood at the first interview, the first interview we had with Mr. Fitzgerald, if he got Mr. Cassidy he would take our stock off our hands and turn it over to Mr. Cassidy.

Q. Was there anything to indicate whether Mr. Cassidy wanted your stock at that time?

A. Not a thing.

Q. And notwithstanding tsat, and notwithstanding the fact that you didn't know whether you could get Mr. Cassidy, you want the Court and jury to understand that he told you Mr. Cassidy would take this stock?

A. He didn't say he would. He didn't know yet that he was going to get Mr. Cassidy.

Q. What did he say with respect to relieving you of the stock? That is what I am trying to get. What did he say about that?

A. He was to take our stock off our hands.

Q. Is that all he said?

A. And turn it over to Mr. Cassidy.

Q. And he said that, notwithstanding the fact he didn't know whether or not he could get Mr. Cassidy as a distributor?

A. Well provided he got Mr. Cassidy.

(Testimony of Arthur J. Sherrill.)

Q. Did he tell you he knew whether Mr. Cassidy would want any of the stock or not?

A. No.

Q. Did you ask him about that?

A. I don't recall that I did.

Q. I beg your pardon.

A. I don't recall. We took it for granted necessarily if he didn't get Mr. Cassidy we couldn't turn our stock over to him. If he did get him, we would turn it over, which we did.

Q. At the second interview, the matter of Mr. Cassidy taking this stock was again spoken of?

A. Yes, sir.

Q. What was said about any arrangement having been made with Cassidy?

A. He said he had made arrangements with Cassidy.

Q. As to what?

A. As to taking on the line and taking our stock.

Q. And is that all the conversation that took place at that second interview?

A. It is not all, of course.

Q. Upon the matters we are talking about, with respect to change of distributor and transfer of tires. There was nothing further said about these two matters?

A. Yes. He thought that he could arrange it so that we could work with Mr. Cassidy and still continue to sell Mohawk tires, and draw from Mr. Cas-

(Testimony of Arthur J. Sherrill.)

sidy for our stock; and we were to meet the next day with Mr. Cassidy and discuss these matters, see if an arrangement could not be made whereby we could continue to sell Mohawk tires.

Q. Was there anything else said on that subject?

A. Said as soon as final arrangements could be made he would give us this letter authorizing our turning this stock over to Mr. Cassidy.

Q. Did he suggest giving you the letter?

A. Yes, said he would give us a letter.

Q. Isn't it a fact that either you or Mr. Munnell demanded a letter to evidence that understanding?

A. I didn't demand a letter. I would have demanded a letter no doubt. We would naturally have had to have some authority for turning it over.

Q. Did you hear Mr. Munnell make such request, that he put it in writing?

A. I don't recall that I did.

Q. Before you got that letter did you have any other interviews on that subject?

A. We had an interview Sunday, that was the day after the stock was taken.

Q. And who was present at that interview?

A. Mr. Cassidy, Mr. Fitzgerald, Mr. Munnell and myself.

Q. Where did that interview take place?

A. Up in Mr. Cassidy's place of business.

Q. Where?

(Testimony of Arthur J. Sherrill.)

A. Broadway and Oak.

Q. Tell us what was said at that interview, and by whom?

A. Well there was considerable said, of course. Mr. Fitzgerald was arranging, or endeavoring to arrange with Mr. Cassidy to have us draw tires from him, and continue to sell Mohawk tires in the city.

Q. Was anything said as to turning over the stock?

A. There was.

Q. All right, tell us what was said on that subject?

A. That list was submitted and they were checking it over, and Mr. Cassidy I believe had informed us that he was just ordering, or had ordered a carload of tires.

Q. That is, from—

A. From the Mohawk. They were getting out a new style of tire, flat tread tire. He was placing an order for a carload, and at that time we were discussing this matter. This list was shown, and there were a number of bad sizes in there.

Q. A number of bad sizes?

A. Well they were sizes that would be pretty hard to sell; slow sellers in other words.

Q. This was the list?

A. This was the list, yes.

Q. That was exhibited to you?

A. Yes; and Mr. Cassidy remarked about cer-

(Testimony of Arthur J. Sherrill.)

tain sizes, and Mr. Fitzgerald said that would be all right, to go ahead and take whatever we sent him, and that if he didn't sell them at a later date he could send them to San Francisco, and that he would give him other tires in exchange.

Q. You are pretty sure Mr. Fitzgerald said to Cassidy you go on and take them anyhow, and if you don't sell them we will take them back?

A. I am positive.

Q. You are positive about that. Was there anything further said about that subject at that interview?

A. Might have been. Naturally there was considerable conversation at that time. That was the principal part of it.

Q. Now the next thing that took place in this transaction was receipt of this letter of September 18th, is that right?

A. Yes, receipt of that letter; yes, sir.

Q. That is the letter authorizing you to turn over the stock?

A. Yes, sir.

Q. You saw that letter, didn't you, when it came to your office?

A. Yes, sir.

Q. Beg pardon?

A. I did.

Q. Saw it the same day it came there?

A. I wouldn't say for sure as to that.

Q. At any rate within a day or so, anyway?

(Testimony of Arthur J. Sherrill.)

A. Yes, within a day or so.

Q. That letter didn't say that Cassidy was to take all the tires that you had to give him, did it?

A. Well the letter will state for itself what it said.

Q. Well you say this part of the letter which said you could turn over such tires as you have in stock, in any quantity or sizes that might be agreeable to yourself and to Cassidy?

A. Yes, sir.

Q. You saw that, didn't you?

A. Yes.

Q. Didn't you realize at that time that under his authorization it was up to Cassidy to say what he would take; whether he would take any at all, or if he did, what tires they were to be?

A. Well if he wanted to—wished to reject the tires, he had the opportunity. He sent down for the tires.

Q. That wasn't at all like you said the conversation was. You said that Fitzgerald said that he would relieve you of all the tires?

A. He did.

Q. And turn them all over to Cassidy?

A. He did.

Q. And under this letter Cassidy would have the right to reject them all, wouldn't he?

A. I don't know whether he would or not. He was told by Mr. Fitzgerald to take any tires that we gave him.

(Testimony of Arthur J. Sherrill.)

Q. Now when you got this letter did you complain to Fitzgerald or write to his home office to the effect that this didn't correctly express your agreement with them?

A. No, I did not, no, sir.

Q. Didn't make any complaint about that at all?

A. No, sir.

Q. You regarded this letter as the evidence of your contract with Fitzgerald?

A. Well I took it as authority, as our authority from him.

Q. Didn't make any complaint. How did you receive—how soon after this letter of September 18th did you send the tires to Cassidy?

A. I believe it was a day or two after that.

Q. Now did you receive any request from Mr. Cassidy for any tires?

A. I don't recall whether we did or not.

Q. You don't know?

A. No, I don't.

Q. Did you have any information from any source as to what you were to send him?

A. Yes, we did. Mr. Cassidy phoned us to get the tires up there as quickly as we could.

Q. Did he tell you what tires to send him?

A. He told us to send the tires.

Q. That is all he said. Is that right?

A. Well, as near as I remember. He got certain sizes that he was urgently in need of,—

Q. Did he tell you what those sizes were?

(Testimony of Arthur J. Sherrill.)

A. Ahead of that time, and got the balance at the time they sent their truck down there for the tires.

Q. Now you say he wanted some tires that he was urgently in need of?

A. Yes.

Q. And he told you what those tires were to be?

A. Yes.

Q. Now the tires that you sent over to him were largely in excess of the tires that he wanted, weren't they?

A. Well I presume that they were.

Q. Yes. You know that the tires that he actually wanted and was badly in need of and spoke of, were certain specified sizes that he asked for. Isn't that a fact?

A. He was in need of certain sizes, yes.

Q. And he asked for those?

A. Yes, he asked for all the tires.

Q. And those sizes you sent him were just a small amount of tires, some thirty casings all told, wasn't it?

A. No, was a number of tires we let him have as quickly as we could, until we could get the balance of the tires up to him.

Q. He requested those particular tires?

A. He requested that we send him all of the tires as quickly as we could.

Q. Now Mr. Sherrill lets get this thing straight.

(Testimony of Arthur J. Sherrill.)

As I understand there were two deliveries, weren't there?

A. There may have been more than that.

Q. Now in the first place, in all of the deliveries, with the exception of this large lot that was delivered, he asked for certain specific sizes, didn't he, and style?

A. I presume he did, yes, sir.

Q. And those were furnished?

A. Furnished if we had them. I presume we furnished them, yes.

Q. As the rest of that, all he did was to telephone you "when are you going to send more tires," is that what he said?

A. He was anxious to have the tires sent over.

Q. Without stating to you what sizes, or how many, or anything else?

A. Nothing said about quantity.

Q. How did you determine how many tires you were going to send him, find what sizes and styles, etc.?

A. Well we determined the amount by the amount of our indebtedness to the Mohawk Rubber Company. The sizes and styles we determined by keeping—we had to retain a certain number of tires, and we kept what we thought was a representative stock.

Q. In other words, Mr. Sherrill, what you did was to take a number of tires which would equal

(Testimony of Arthur J. Sherrill.)

the indebtedness, and send them down to Cassidy. Isn't that what you did?

A. That is practically correct, yes. I presume the number of tires covered the indebtedness.

Q. And you did that with the exception of the small quantity for which Cassidy actually requested shipment?

A. Cassidy requested shipment of all the tires.

Q. That was the blanket order that you speak of. But in the first place he asked for certain specific sizes, is that right?

A. We made no arrangement with Mr. Cassidy to return tires to him. Our arrangement was made with Mr. Fitzgerald.

Q. I am not talking about your arrangement. I want to know what was done actually. I want to know how you came to ship—to send him this particular group of tires. As I understand you—if I am wrong I want you to correct me—we want to get this thing right to the jury. There were a small number of tires sent by special request from him, on which he gave you sizes and descriptions. Is that right?

A. Yes.

Q. And then on the rest of them you just selected enough tires to balance your account, without any information from Cassidy as to size, style or anything else?

A. Well he saw the list.

(Testimony of Arthur J. Sherrill.)

Q. Never mind what he saw. I want to know what you did.

A. That is what we sent him.

Q. Now then you know as matter of fact that Cassidy didn't keep these tires, don't you?

A. I presume he did not.

Q. You know he sent them back to San Francisco?

A. I understood he sent them to San Francisco after his carload of tires had arrived.

Q. That is your understanding of it?

A. That is what he told me.

Q. Did he tell you that?

A. Yes.

Q. Are you sure?

A. Yes.

Q. You know it to be a fact he sent those down there before he got his tires from the factory?

A. I don't know it to be a fact. I just know—

Q. Do you want to state positively to the jury that Cassidy sent these tires back to San Francisco before he got the factory shipment? That Cassidy told you that?

A. No, he didn't tell me that. He told me he sent them as soon as his car arrived, or after his car arrived; that he had plenty of new stock, and he didn't want them any longer.

Q. Do you want the Court to understand that is what Cassidy told you?

A. That is what Cassidy told me, yes.

(Testimony of Arthur J. Sherrill.)

Q. There isn't any mistake about that in your mind at all?

A. Not a bit.

Q. You remember that distinctly?

A. Yes.

Q. When did he tell you that?

A. He told me shortly after, when we were talking about this telegram that came back, and we were discussing the matter with him regarding him sending the tires to San Francisco.

Q. You got word from San Francisco that bunch of tires was down there, didn't you?

A. We received a wire.

Q. They wanted to know what those tires were down there for?

A. Yes.

Mr. BISCHOFF: Let me have the telegram that you received.

(Wire produced.)

Q. Is this the wire you referred to?

A. We received that wire from them, yes.

Mr. BISCHOFF: I offer it in evidence.

Telegram marked "Plaintiff's Exhibit BBB" and read.

Plaintiff's Exhibit BBB

1921 Oct. 12, PM 2 43.

VN San Francisco Calif 210P 12

Munnell and Sherrill

40 First St., Portland, Ore.

Steamship company just notified us large ship-

(Testimony of Arthur J. Sherrill.)

ment tires received from Portland our shipping clerk investigated and finds same to be your old stock improperly packed damaged dirty and unsalable at regular prices and we do not propose that it is going to be thrown back on our hands as you only had the authority of turning over to Cassidy the stock he could use and retain. The shipment is being held at local depot subject to your risk and demurrage charges plus freight we might use same at sixty per cent but nothing less. Wire your disposition.

Mohawk Rubber Company.

Q. Were all the tires enumerated in this list turned over to Cassidy?

A. No, I don't believe they were. That is practically a stock list. That is very close to the tires that we had on hand. There might have been a few exceptions that we didn't—that we may not have taken extra close.

Q. Now isn't it a fact Mr. Sherrill that in this list of tires that you turned over to or sent to Cassidy, was a large quantity of tires of sizes that were obsolete—that were no longer in use?

A. No, they were all tires that were in use; are in use today.

Q. You want the Court to understand that all sizes—they were all sizes that were current and regular sellers?

A. There might have been a very few, what they would term odd sizes, at that time.

(Testimony of Arthur J. Sherrill.)

Q. I want to call your attention to this size 32x3½. Wasn't that a size they had ceased manufacturing at that time?

A. I don't believe they had. I think still manufacturing 32x3½. I think they still list it.

Q. I mean 34x3½.

A. 34x3½. I believe they were manufacturing it. I think they still continue to manufacture.

Q. Now the greatest part of this stock was also fabric tires, wasn't it?

A. Well there is possibly a good portion of it fabric, yes.

Q. You know it to be a fact that at that time they were getting away from the production of fabric tires, and that the tendency was entirely toward cord tires?

A. I do.

Q. Now practically all of these sizes, Mr. Sherrill, while we won't use the term obsolete, were sizes that were not ready sellers; that is, they were unusual sizes, not ones that were readily called for?

A. No, there was a great many of the regular sellers in stock. This stock was not balanced very good because of the fact that we had been unable to move our stock and had to take back so much stock from dealers.

Q. But a goodly portion of this represented these odd sizes of stock?

A. No, I don't think a goodly portion of it does.

Q. Now in the stock that you retained for your

(Testimony of Arthur J. Sherrill.)

own use, did you retain any of these odd sizes?

A. We did.

Q. Have you a list of the stock you retained here?

A. Our stock records will show, yes.

Q. Have you this list here? I believe they have.

Mr. BISCHOFF: I offer in evidence a telegram from Munnell & Sherrill to the Mohawk Rubber Company dated October 12th.

Received without objection and marked "Plaintiff's Exhibit CCC."

Plaintiff's Exhibit CCC

Portland, Oregon, Oct. 12, 1921.

Mohawk Rubber Company,

San Francisco, Cal.

At a loss to understand why you wired us as we have shipped no tires to San Francisco all of our stock was turned over to the American Tire and Rubber Company as per written instructions from Fitzgerald.

Munnell & Sherrill.

Q. Now did you send that wire?

A. I don't believe I sent it.

Q. You knew it was forwarded?

A. Yes, the wire was sent.

Q. You also know that you hadn't turned over the entire stock, didn't you?

A. All of the tire stock?

Q. Yes.

A. No, we didn't turn over all the tire stock.

(Testimony of Arthur J. Sherrill.)

Q. Your statement in this telegram that you turned over all of your stock is not correct?

A. They had a list of the stock—that wire would not be correct in that one point, no.

Q. You hadn't turned over the whole stock.

Mr. BISCHOFF: I offer in evidence letter of October 12, 1921, from Munnell & Sherrill to plaintiff.

Received without objection and marked "Plaintiff's Exhibit DDD."

Plaintiff's Exhibit DDD

Portland, Oregon, Oct. 12, 1921.
Mohawk Rubber Company,
1436 Van Ness Ave.,
San Francisco, Cal.

Gentlemen:

We have just received your wire and were certainly surprised at its tone. We have never shipped any tires to San Francisco, but did turn over a large portion of our stock to the American Tire & Rubber Company on the written instructions from Mr. Fitzgerald, who was here at the time and who knew what Mr. Cassidy was going to receive, and it is our understanding that he gave Mr. Cassidy the privilege of keeping the tires at an extra discount or returning them to the factory.

We have just called up Mr. Cassidy, who verified this and informs us that he shipped a quantity of tires to San Francisco, so, no doubt, this is the shipment you referred to in your wire.

(Testimony of Arthur J. Sherrill.)

We take it for granted that Mr. Fitzgerald is out of the city and he has not informed you fully regarding this transaction, and when you get in touch with him no doubt the matter will be explained to your full satisfaction.

Awaiting your further favors, we are,

Yours very truly,

Munnell & Sherrill,

By A. J. Sherrill.

Q. Now Mr. Sherrill, this letter was written by yourself, wasn't it?

A. Yes.

Q. The fact of the matter is that Mr. Fitzgerald had left the city some several days before you made this transfer of tires to Cassidy?

A. I presume that he was out of the city when the transfer was made.

Q. The fact is that he mailed you this letter of September 18th from his hotel just before he left?

A. Yes.

Q. So that it wasn't quite correct for you to say that Mr. Fitzgerald knew what stock was to be turned over to Mr. Cassidy?

A. It was correct, because he took the stock himself.

Q. When you say he took the stock, you mean making this inventory you spoke of?

A. Yes, the inventory; he knew what the stock was.

Q. But you didn't send all that stock in the

(Testimony of Arthur J. Sherrill.)

inventory, did you?

A. I didn't send all of it.

Q. And you hadn't arranged with Mr. Fitzgerald before he left, just what particular tires you were going to send, did you?

A. He gave us that letter and left town.

Q. But Fitzgerald didn't know just what particular part of the stock you were going to give Cassidy?

A. We supposed he knew at that time, because we sent him a list of the stock that was turned over. He should have had the list.

Q. But it wasn't correct for you to say to the office that Fitzgerald knew when he left here what stock Cassidy was going to get, was it?

A. As far as he knew, we could have included all that stock.

Q. Don't you want to answer that, Mr. Sherrill?

A. Yes.

Mr. LILJEQVIST: I think that is answered.

A. I don't know whether you would call it correct or not. Mr. Fitzgerald certainly knew what stock Mr. Cassidy was going to get.

Q. That question is very simple, Mr. Sherrill, it seems to me. I am trying to find out and to get the jury to know whether you had advised Mr. Fitzgerald—

A. We had.

Q. —before he left here—

A. No.

(Testimony of Arthur J. Sherrill.)

Q. —what particular tires you were going to give Cassidy. Is that clear?

A. I did not advise him.

Mr. BISCHOFF: Letter of October 14th offered in evidence.

Letter marked "Plaintiff's Exhibit EEE."

Plaintiff's Exhibit EEE

San Francisco, Cal., October 14th, 1921.

Munnell and Sherrill,

Portland, Ore.

Gentlemen:

This will acknowledge your letter of the 12th inst., regarding our wire of the 12th inst., pertaining to a shipment of tires to us from the American Tire and Rubber Co. and which we find to be stock that you turned over to them during the recent transaction.

Regarding the writer's recent letter to you, in which you were authorized to turn over to the American Tire and Rubber Co. any stock which they desired: It was supposed that you would turn over them stock which they could use and which could be sold at regular prices, and since the writer has inspected the shipment which they returned, he does not wonder that they refused to retain same, as the major portion of the shipment is in such condition that it could not be sold at regular prices, some of the tires are without wrappers and have been in this condition for months.

(Testimony of Arthur J. Sherrill.)

It was understood by the writer that the major portion of your stock was in popular sizes of fabrics and cords, also the tires were wrapped and clean and in such a condition that same could be sold without a loss, however, we find that such is not the case and therefore the ownership of the stock reverts to you and it is being held here subject to your risk and we would suggest that you give the matter immediate attention.

We advised you in our wire of the 12th inst. that as a matter of policy we would be willing to take in this stock at 60 per cent net, plus war tax, and if you desire to accept our offer, you can advise us immediately on receipt of this letter. The only way in which we could sell this stock would be at a price equivalent to that which we offer you. We would not make a dollar profit on the transaction, but on the other hand probably lose money through selling expense and etc., so you can readily appreciate our position in the matter and know that our offer is being made solely thru a desire to relieve you of return freight charges to Portland.

Yours very truly,

Mohawk Rubber Co., Inc., of N. Y.

By W. G. Fitzgerald,

Pacific Coast Manager.

Q. Mr. Sherrill, in purchasing these tires that are resold, the regular way of transacting business is that they are sold according to certain list price with a stated discount from that list?

(Testimony of Arthur J. Sherrill.)

A. They are, yes, sir.

Q. That was forty per cent off list price?

A. Yes.

Q. That is, you bought at forty per cent off?

A. Yes, sir.

Q. And this offer to take them off your hands at sixty per cent off meant that the discount was twenty per cent?

A. It was more than twenty per cent.

Q. You were buying at forty off list?

A. Yes.

Q. And they were offering to take off your hands at sixty off list?

A. Yes, but that would be more than twenty per cent difference.

Mr. BISCHOFF: We offer letter of October 18, 1921, from defendant to plaintiff.

Received without objection and marked "Plaintiff's Exhibit FFF."

Plaintiff's Exhibit FFF

Portland, Oregon, Oct. 18, 1921.

Mohawk Rubber Company,

San Francisco, Cal.

Attention Mr. W. G. Fitzgerald.

My Dear Fitz:

Yours of the 14th at hand and it would appear from the tone that someone had done something that you didn't approve of and having no one else to lay it on, you were slipping it to us.

Now, it doesn't seem as if there should be any

(Testimony of Arthur J. Sherrill.)

misunderstanding regarding this matter. Before you ever made the deal with Cassidy you asked us if it would be all right to make the deal providing you relieved us of our stock. Both Mr. Munnell and the writer assured you that it was not only agreeable to us but we would be glad to assist you in any way possible in landing another distributor, as we felt that if you could secure greater volume by switching the account, we would not stand in your way, altho we would regret very much having to give it up after working so hard to establish it in this territory. With this understanding you went ahead and lined up the American Tire & Rubber Company, after which, you gave us a letter authorizing us to turn our stock over to them, which we proceeded to do. As you no doubt have a copy of the letter, you know what it contains and we feel sure that you will agree that your instructions are very definite and clear as to what we were to do.

As to the sizes and conditions of the tires, you saw the list of sizes before they were ever turned over to Cassidy, so knew just what it contained. While a few of them naturally had the wrapper off, the most of them had never been unwrapped and were just as we had received them from the factory. By the way, we recall having received shipments from San Francisco where the tires were improperly wrapped or else entirely without covering.

Just what your arrangements were with Mr. Cassidy we are not aware. He informs us, however,

(Testimony of Arthur J. Sherrill.)

you offered him an additional discount to keep certain of this stock, which in itself would make it appear that you were aware of the condition the stock was in at the time you were making your deal with him.

As the matter now stands, we have carried out your exact instructions in this matter as per your letter of Sept. 18th and cannot see how we are concerned in any way with any shipment of tires that may have been made to you by parties other than ourselves. We have your authority and the American Tire & Rubber Company's receipt for delivery of tires and we are now awaiting credit due us on these tires, as well as a rebate agreed upon at the time the reduction was made in May.

We want to continue friendly with the Mohawk Rubber Company and to handle the line as outlined between yourself and Mr Cassidy and ourselves and we trust that nothing will arise from this complication to prevent us from doing so.

Trusting that you get this matter adjusted to your entire satisfaction and assuring you of our cooperation, we are,

Yours very truly,

Munnell & Sherrill,

AJS:A

A. J. Sherrill.

Mr. LILJEQVIST: We have a witness who has to leave town, and we would like the privilege of putting him on now.

Witness withdrawn.

(Testimony of W. D. Miles)

W. D. MILES, a witness called in behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Liljeqvist:

What is your residence and occupation?

A. I am a salesman at the present time. Portland is my residence.

Q. Have you been in the tire business?

A. I have.

Q. Were you in the tire business in 1919, 1920 and 1921?

A. 1919 and 1920 I was.

Q. At what place?

A. Portland and The Dalles.

Q. While you were at The Dalles will you state whether or not you entered into an agreement as a dealer, with Munnell & Sherrill, to handle Mohawk tires in your country up there?

A. I did.

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial. I don't see, under the pleadings, how what agreement he had would be material.

COURT: I can't tell anything about it until I know what they expect to prove. He only asked if they entered into an agreement.

Mr. LILJEQVIST: Something was referred to by Mr. Bischoff in the testimony in reference to a

(Testimony of W. D. Miles)

\$10,000 order of Clark & Miles for Mohawk tires, from Munnell & Sherrill.

Q. Are you one of the members of the firm?

A. I am.

Q. Do you remember about that transaction?

A. Yes, something.

Q. Did you put in an order to Munnell & Sherrill for that amount of tires?

A. As I recal, something of that amount.

Q. How long did you handle the Mohawk line?

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial. I don't see what his arrangement has to do with it.

Mr. LILJEQVIST: They have offered a lot of letters here that they have introduced, talking about the arrangements, attempting to show that Munnell & Sherrill got into financial slowness in payment of certain bills. They have offered a lot of evidence about the Clark & Miles account, themselves. Now that being true, they have brought out that transaction. They are apparently attempting to show that the Mohawk Company in this case were very philanthropic towards Munnell & Sherrill in carrying their account from a certain period to a certain period; that due to the kindness of this company in failing to press the payment of certain notes, things went wrong. That is kind of the impression that you gather from that, in reference to the Clark & Miles transaction that they brought out, the \$10,000 deal that they brought out, and these letters in ref-

(Testimony of W. D. Miles)

erence to it, and different things which they ask to have the jury believe that we were in the wrong and they in the right. We wish to show that when we took this line we naturally relied upon the fact that these were good, and we unfortunately happened to get at the time these tires were not good. We are not saying anything against the Mohawk line at present because they did change their line about that time.

Mr. BISCHOFF: I object to a volunteered statement of that kind. There is nothing in the evidence to support it.

COURT: I don't think either of you have much effect on the jury on statements made outside of the record. The jury will decide this case on the evidence.

Mr. LILJEQVIST: We offer to show by this witness that this \$10,000 lot which he bought from Munnell & Sherrill which has been referred to—the reason he wasn't able to sell this line was because the tires didn't stand up, and he couldn't take and wouldn't take the tires from Munnell & Sherrill, because they wouldn't stand up to the guaranty. People to whom he sold them returned them to him, claiming they were no good. He was losing customers, and he returned the stocks to him and had a lot of difficulty over these tires. This man was one of the biggest dealers in the state of Oregon handling these tires.

COURT: What has that to do with this case?

(Testimony of W. D. Miles)

Mr. LILJEQVIST: I want to meet what they brought out.

COURT: The case is to be tried on the issues made here, and written contract between defendant and plaintiff, whether entitled to a rebate, or whether entitled to credit for the return of the tires.

Mr. LILJEQVIST: But if they seek to draw the inference from this state of facts, that we were in default, we wish to show the default was not our fault, because we couldn't sell the tires on account of the quality being bad.

COURT: As I understand the pleadings there is no question of defects. They haven't set up any defense that the tires were not up to standard, or that you lost money on it on account of defective tires.

Mr. LILJEQVIST: I wish to show by this witness and ten other witnesses—to prove defective tires.

COURT: Prove something wholly outside the issues in the case.

Mr. LILJEQVIST: To meet the testimony they have offered.

COURT: They haven't offered testimony to that effect. I think we will confine the investigation to the issues in the case, and not go outside.

Exception saved.

Mr. BISCHOFF: I want to assign as misconduct the remarks of counsel upon questions not pre-

(Testimony of W. D. Miles)

sented by the issues, entirely foreign, and made for the purpose of reaching the jury on an extraneous matter.

COURT: You have your exception.

Mr. BISCHOFF: I want to assign as misconduct in referring to questions of that kind wherein he went outside of the record entirely.

COURT: I don't think counsel on either side should make that kind of a record of that kind of a statement. Counsel was probably mistaken in the view the Court has of the issues in the case.

Mr. LILJEQVIST: I wish to show to meet his record which he has offered.

Witness excused.

Whereupon proceedings were adjourned until 9:30 tomorrow morning.

Tuesday, June 19, 1923, 9:30 A.M.

ARTHUR J. SHERRILL resumes the stand.

Cross Examination (Continued)

Mr. BISCHOFF: May I have letter of November 14, 1921?

Letter produced and offered in evidence.

Mr. LILJEQVIST: Same objection. Irrelevant, incompetent, immaterial and self serving.

Objection overruled, exception saved.

Letter marked "Plaintiff's Exhibit GGG," and read.

(Testimony of Arthur J. Sherrill.)

Plaintiff's Exhibit GGG

Akron, Ohio, Nov. 14, 1921.

Munnell & Sherrill,
Portland, Oregon.

Gentlemen:

The writer's attention is called to the controversy which has arisen between you, the American Tire & Rubber Company of your city and the San Francisco Branch with reference to a quantity of tires which you delivered to the American Tire & Rubber Company and which they, after failing to return these to you, eventually shipped to San Francisco.

It is the writer's understanding that these tires are now in public storage and that the branch has refused to accept them. Inasmuch as the tires were originally shipped to you and have never been charged to any one else, it is natural and logical that they be considered your property regardless of the course which they took after leaving your hands.

Reviewing the whole proposition, the difficulty very evidently started when you bought goods far in excess of your reasonable needs; and it would have been much worse had we not refused to ship orders to the extent of your desires. The depression left you a stock of goods on hand and heavy indebtedness.

This indebtedness to us was taken care of by

(Testimony of Arthur J. Sherrill.)

notes which indefinitely acknowledged the debt and which have not as yet been entirely paid.

Since then, various contentions have been made in an endeavor to get us to take back goods which we shipped in good faith and on written orders and which have since become more or less deteriorated thru age and which we would be unable to sell and realize full value.

The permission which you were given to deliver tires to the American Tire and Rubber Company says very distinctly that the tires were to be delivered in any quantity or sizes that might be agreeable to yourselves **and** Mr. Cassidy. It is our understanding that he did not request nor agree to the return of this lot of tires in question. And it was clearly understood at the time that this was merely permission for him to draw upon your stock for such goods as he might need, and that the permission was largely necessary on account of the matter of credit to him being involved.

A letter in our files indicates that at the time the arrangement was made, it was your desire and your expectations to continue the sale of Mohawk tires in a retail way; and at the time we were very glad to see this arrangement made.

So far as getting your permission to sell the American Tire & Rubber Company, we do not consider that that was necessary, since you had utterly failed to live up to the terms of payment, to work the terriotry or in any way carry out the under-

(Testimony of Arthur J. Sherrill.)

standing under which the territory was originally turned over to you.

Now we don't feel unfriendly toward you; but we do know that you are attempting to take advantage of us and are not particular as to how you do it. And we resent this and shall resent it in every way possible.

The notes which we hold must be paid; also your current account. We have been exceedingly lenient, and it does not set very well to have you attempt to take advantage of this fact in the way in which you have.

So far as any rebates are concerned, old goods which you had on hand thru overbuying on your own part and which did not come under the requirement of goods purchased within 60 days of the price change and on hand and unsold at that time, would not be considered. It is clearly apparent that any loss along these lines is no fault of ours and that we cannot assume the responsibility of your stock indefinitely.

This action on your part has simply served to confuse matters without accomplishing anything in any way, shape or manner. And for our own protection, it seems as if it was necessary that we place this matter in the hands of our attorneys with instructions to take whatever steps are necessary to enforce collection.

We know absolutely that we are entirely in the right in this matter, and we know that you know

(Testimony of Arthur J. Sherrill.)

that we know it. Therefore, we shall expect that this quibbling stop and that some determined effort be made to clean this matter up without further delay. We are naturally sorry if your operations have resulted in loss to yourselves, but we cannot see how we in any way are responsible.

Yours very truly,

The Mohawk Rubber Company.

M. E. Mason,

Sales Manager.

MEM:DH

Dict. 11-12.

Questions by Mr. Bischoff:

Mr. Sherrill, I want to ask you about an interview with Mr. Fitzgerald that you spoke of yesterday, that took place in June, 1921, after the May decline was announced, the decline of May 10th. Will you state as nearly as you can when that conversation took place?

A. As I recall it it was some time in June.

Q. With reference to the receipt of the circular list of May 10th, can you state approximately the period of time that elapsed between the receipt of these letters and your interview with Mr. Fitzgerald?

A. It was shortly after the receipt of these letters. I believe we received these in May, and I believe Mr. Fitzgerald came up early in June.

Q. Well the fact was he announced his coming up, or you received information about his coming

(Testimony of Arthur J. Sherrill.)

up, by telegram of June 18th, that he would be there a few days after that telegram?

A. We received some word from him saying that he would be there, as I recall it.

Q. Did you know what the occasion of his coming up at that time was?

A. I presume to arrange for our rebate, as there had been some correspondence on that matter.

Q. Isn't it a fact that he came up here to insist on a liquidation of some of these notes that have been protested?

A. Not to my knowledge.

Q. Didn't he speak about that at all?

A. He possibly did while he was here. He may have spoken about the notes.

Q. You haven't any recollection of him talking about the past due notes?

A. I haven't at the present time, no. He would have been more likely to have spoken of that to Mr. Munnell.

Q. Did he speak to you about the unpaid balance of the open account which was then past due?

A. He may have spoken of it, yes.

Q. You say he may have. Have you any recollection about that?

A. I have no recollection about that at all.

Q. The only recollection which you do have definitely is that he spoke about rebates?

A. That, as I recall it, was the purpose of his trip to Portland.

(Testimony of Arthur J. Sherrill.)

Q. That is the only thing you remember clearly talking about rebate?

A. That would have been the—

Q. I am talking about your recollection.

A. That is my recollection, yes.

Q. On that your recollection is clear?

A. Yes.

Q. But upon other matters you have no recollection at all?

A. No, I have no recollection at all about other matters. It may have been or it may not.

Q. Did you write him to come up here to talk about rebates?

A. I don't remember that we did, no. I believe he wrote us he would or wired. At any rate he sent us some kind of a wire he would be up here.

Q. You want the jury to understand Mr. Fitzgerald voluntarily wired you he was coming up to talk about rebates with you?

A. No, I don't recall that he did.

Q. Now did he talk with you about these rebates when he came up in June?

A. Yes.

Q. Were you the first one he talked with about the matter?

A. I couldn't say about that, we were there together.

Q. Was anybody present at the conversation between you and Mr. Fitzgerald?

A. Mr. Munnell and Mr. Auspach.

(Testimony of Arthur J. Sherrill.)

Q. Were they both present in the room, taking part in the conversation?

A. As I recall it they were both present, yes.

Q. Or is this another instance where they were in an adjoining office?

A. Well our office is pretty much the same. There is very little—it is practically one office. As a rule we transact matters of our business, or did at that particular—

Q. I am trying to find out were they present in your office talking about this thing together, or did you just assume they were part of the conversation because they were in the adjoining office?

A. I believe that they were present at the time.

Q. Now what was said on that subject at that time?

A. Well Mr. Fitzgerald said that the condition of the stock was such that it would be pretty hard to get at the matter any other way, and he thought our list as sent him was too large; that one of these notes would be a reasonable rebate.

Q. Was that the first thing that was said about the subject?

A. Well I wouldn't say it was the first thing. It was in—

Q. What invited the suggestion from him of a compromise in that way?

A. Well I presume the fact that we had sent a list to them in San Francisco of our stock on hand.

Q. That is what I am trying to get at.

(Testimony of Arthur J. Sherrill.)

A. Yes.

Q. The list you sent them was the stock you had on hand?

A. Stock we had on hand.

Q. But that list didn't indicate which of that stock had been purchased within sixty days prior to the decline, during March and April, did it?

A. As I recall it, that list didn't indicate anything except the stock on hand.

Q. Nor did the list indicate any stock which you had sold to your dealers, these people who were buying from you?

A. No, I don't believe it did.

Q. Now, didn't Mr. Fitzgerald tell you at that time that under the announcement of the decline in price, that they—that you were entitled to receive rebate only on the merchandise purchased and unsold within March and April, 1921?

A. He did not.

Q. He didn't tell you anything about that?

A. No, sir.

Q. Now was the subject of dating orders discussed at that time?

A. I don't recall that it was.

Q. Nothing said about that at all by you or Fitzgerald?

A. I don't recall that it was; it may have been, but I don't recall.

Q. You have no recollection about it?

(Testimony of Arthur J. Sherrill.)

A. I have no recollection of any particular part of it.

Q. Now did you notify—did you tell Fitzgerald or notify the company in any manner as to you making any rebates to your dealers for any stuff that they had purchased from you?

A. Not to my knowledge.

Q. You never gave them any such information?

A. No.

Q. Now had you in fact taken any dating orders from any purchaser—any of your customers?

A. I couldn't state as to that.

Q. You never did advise the plaintiff or Fitzgerald about having taken dating orders, or the amount of dating orders that you took?

A. I don't recall anything being said about that at that time.

Q. Now when Mr. Fitzgerald, as you say, suggested compromising the amount of your rebate, did you request him to give you some memorandum to that effect?

A. No, sir.

Q. Did you ask him to have the note returned to you at once?

A. No, sir.

Q. Did you write to the company to ask them to return that note to you?

A. We wrote—as I recall it we wrote to San Francisco.

Q. When was that?

(Testimony of Arthur J. Sherrill.)

A. I don't recall the date. I believe the carbon will show where we asked them for the return of the note.

Q. Have you carbon copy of any letter that you sent to anyone connected with the plaintiff company, asking for the return of that note? If so, please produce it.

A. I believe that we have.

Mr. BISCHOFF: I offer in evidence letter of February 20, 1922.

Letter marked "Plaintiff's Exhibit HHH," and read.

Plaintiff's Exhibit HHH

Portland, Ore., Feb. 20, 1922.

Mohawk Rubber Co.,

San Francisco, Cal.

Gentlemen:

We enclose you, herewith, our check for \$522.65 with which we have paid you all that we owe you and would ask that you return to us at once our notes which you have in your possession.

Yours very truly,

Munnell & Sherrill,

AJS:A

By

Q. Now is that the first letter you ever wrote asking for the return of the note?

A. What is that date please?

Q. February 20, 1922.

A. I believe you will find a letter from Mr. Munnell in November. I think you will find something

(Testimony of Arthur J. Sherrill.)

in November or December, where Mr. Munnell asks for the return of the note.

Q. Have you the carbon copies of those letters?

A. I don't see the carbon copy of the letter I have in mind, but I believe you will find the letter there from Mr. Munnell, in reply to Mr. Fitzgerald's, if my recollection serves me right.

Q. Now Mr. Sherrill, since you testified yesterday have you looked over the records to ascertain the amount of purchases made each month during the time that you did business together?

A. I believe that they have the amounts there, yes.

Q. You haven't looked them over since we spoke about them yesterday?

A. I believe the amounts will appear at the time.

Q. Now Mr. Sherrill, during the latter part of 1921, say from March to August, you made purchases in the regular course, from plaintiff, of such tires as you desired or needed?

A. Yes, sir.

Q. And you made cash payments during these months from March to August, as you went along?

A. I presume that we did.

Q. I show you this statement of account, Plaintiff's Exhibit A, and ask you if that refreshes your recollection?

A. It does not, because I have no—

(Testimony of Arthur J. Sherrill.)

Q. Don't you want to look at it before saying it doesn't?

A. Well, I have nothing to do with that part of the business. Mr. Munnell or Mr. Auspach took care of the accounts. I have nothing to do with the books.

Q. You know in a general way that during that period of time that you paid for these current purchases very promptly, and took the discounts as you paid for them?

A. Well, frankly, I don't.

Q. You don't know?

A. No, really I don't.

Q. Who looks after the business management?

A. Mr. Munnell and Mr. Auspach would be the proper parties.

Q. What is your part of the work in that affair?

A. Well, I am generally considered as outside man. Mr. Munnell is the office man.

Mr. LILJEQVIST: We offer in evidence letter sent by Munnell & Sherrill to the Mohawk Rubber Company at San Francisco, August 15, 1921.

Received without objection and marked "Defendants' Exhibit 11."

Defendants' Exhibit 11

August 15, 1921.

Mohawk Rubber Co.,

San Francisco, Cal.

Gentlemen:

We enclose herewith our check in the sum of

(Testimony of Arthur J. Sherrill.)

\$2024.40 to cover July bills subject to discount, and a payment of \$1000.00 on old account. On back of check you will find distribution as we have arrived at it.

Seems as though we should have our credit for price decline which took place over ninety days ago. Have looked for it on our statements for July and August, but to date it has not appeared. Wish you would ask the factory to put this through, and greatly oblige,

Yours very truly,

Munnell & Sherrill,

EJM:HAA

By

Mr. LILJEQVIST: Letter of November 9, 1921, offered in evidence, received without objection and marked "Defendants' Exhibit 12." Read.

Defendants' Exhibit 12

Nov. 9th, 1921.

Mohawk Rubber Co.,

1436 Van Ness Ave.,

San Francisco, Cal.

Att'n Mr. W. G. Fitzgerald.

Gentlemen:

Replying to your letter of the 5th, we will have to take exceptions to some of the statements contained in the second paragraph as not applying to this particular deal.

In the first place, we did not unload our entire stock of tires on you as you state; on the contrary, we kept over five thousand dollars worth, includ-

(Testimony of Arthur J. Sherrill.)

ing round tread cords and fabrics which were on the list submitted to you and Mr. Cassidy when you were here. Instead of turning over the lot to you, we tried to be fair to all concerned, and kept a good many which can be considered as slow movers, especially in view of conditions which are applying to the tire business at this time.

In the second place, in all of our conversations regarding the deal, there was no mention made to the writer, of any portion of it being contingent on whether the American Tire & Rubber Co. kept our stock or shipped it to other parts. You were anxious to deal with the other company, as they were considered the best tire account in Portland, and we were willing to step aside providing **you** took our stock off our hands at what it cost us. You agreed to that, and that is all there is to it as far as we can see.

When we get the credit memos for the stock turned over and to cover the decline in prices, if the account still shows that we owe you money, we will remit, but at the present time, the way we figure, we are about even.

So if the next step is to put it up to Akron, let it be soon, as we can see no reason why it should not have been settled a long time ago.

Yours very truly,

Munnell & Sherrill,

By

Mr. LILJEQVIST: Letter of January 23, 1922,

(Testimony of Arthur J. Sherrill.)

offered in evidence, received without objection and marked "Defendants' Exhibit 13."

Defendants' Exhibit 13

January 23rd 1922.

Mohawk Rubber Co.,

1436 Van Ness Ave.,

San Francisco, Cal.

Att'n Mr. Fitzgerald.

Gentlemen:

We have just replied to your wire authorizing you to let Mr. Irving A. Heusner have what tires he needs to be charged to our account.

And on this subject, we will try and have a check for the current items mailed you in a few days. We have been having a hard time to get our money during the past two months, especially from the Idaho territory, and Mr. Sherrill has just left for that part of the country to get the money if it is possible to do so.

It seems impossible for us to get our rebates through in proper form, both from your office and from your local distributor. The credit you sent us for rebate covering tires on hand Nov. 15th, which were purchased within the previous sixty days, was not in line, as you will readily see by glancing at it.

We are returning it for correction, and will trust that you can have it figured correctly so that it will agree with our records.

Yours very truly,

Munnell & Sherrill,

By

EJM:HAA

(Testimony of Arthur J. Sherrill.)

Mr. LILJEQVIST: Letter of December 8, 1921, offered in evidence, received without objection and marked "Defendants' Exhibit 14." Read.

Defendants' Exhibit 14

Dec. 8th, 1921.

Mohawk Rubber Co. of N. Y.

1436 Van Ness Ave.

San Francisco, Cal.

Att'n Mr. McCullough.

Gentlemen:

Answering your letter of the 6th, we are returning the invoice covering freight charges, as our bookkeeper has no use for it either for recording or filing. It is true he asked you for a copy, having in hand your statement of account and not being able to locate a charge which you had against us.

It seems to the writer that it would be advisable to hold all of these matters in abeyance until you are correctly informed as to who shipped the tires to you, and why they were shipped. We have endeavored to give you the facts in the case, and you can easily verify them by looking at your freight bill and bill of lading covering the shipment in question.

We presume that Mr. Fitzgerald will be back in San Francisco shortly, and he will be in position to give you sufficient information to enable you to pass the additional credit memos due us, as well as

(Testimony of Arthur J. Sherrill.)

straightening out the misunderstandings that seem to have arisen between us.

Yours very truly,

Munnell & Sherrill,

EPM-HAA

By

Mr. LILJEQVIST: Letter of December 8, 1921. Offered in evidence, received without objection and marked "Defendants' Exhibit 15."

Defendants' Exhibit 15

Dec. 7th, 1921.

Mohawk Rubber Co. of N. Y.

1436 Van Ness Ave.

San Francisco, Cal.

Gentlemen:

Replying to your letter of Nov. 30th, inasmuch as we have not shipped you any tires, we are at a loss to understand why you continually write us in reference to same.

Previous correspondence covers the matter fully and we cannot see where there is any further need for letter writing on our part. Just put through the balance of the credit memos due us on this deal, so that your records will agree with ours, and we will all be in a better frame of mind.

Yours very truly,

Munnell & Sherrill,

EJM-HAA

By

Mr. LILJEQVIST: I offer letter of December 2, 1921. Received without objection and marked "Defendants' Exhibit 16."

(Testimony of Arthur J. Sherrill.)

Defendants' Exhibit 16

Dec. 2nd, 1921.

Mohawk Rubber Company,
1436 Van Ness Ave.,
San Francisco, Cal.

Gentlemen:

We are in receipt of your credit memo of Nov. 29th, covering some of the tires turned over to the American Tire & Rubber Co. of this city. As this covers only a small portion of the tires turned over to them at the same time, we wonder what has become of the balance of the credit. Mr. Fitzgerald informed us when he was here last month, that credit memos would be sent us promptly for the lot, and we trust they will be forthcoming shortly.

The copy of your Oct. 20th invoice amounting to \$135.26 is being returned with this letter for the same reason that we returned the original under date of Oct. 27th. It is not a proper charge against us and should be cancelled.

Yours very truly,

Munnell & Sherrill,

EJM-HAA

By

Redirect Examination.

Questions by Mr. Liljeqvist:

Now, Mr. Sherrill, I think we might as well complete some of this correspondence before we go any further. Have you letter of June 2, 1920?

Offered in evidence, received without objection and marked "Defendants' Exhibit 17."

(Testimony of Arthur J. Sherrill.)

Defendants' Exhibit 17

June 2, 1920.

Mohawk Rubber Co.,
Akron, Ohio.

Attention Mr. Mason.

Gentlemen:

Just received a very pleasant visit from Mr. Fitzgerald. While here we took up the matter of advertising, and he assured us he would use his good offices with the company to endeavor to secure us some bill board advertising. There are a few very desirable locations that can be secured here at the present time, and we believe it will be productive of good results if we can secure some of this type of advertising.

The tire situation here at the present time is very bad. The gas shortage has scared the tourist out almost entirely, as well as cutting down local consumption. Almost every mail brings us in hard luck stories from our dealers, who still have their stocks on hand, and in some cases we have had service stations close entirely and return their tires to us for credit. What seemed to be the prospects of being an especially good year has now terminated into a very doubtful one, and unless the gas situation improves within the coming month, our tire business is going to fall far short of our expectations.

The condition of our dealers thruout the country will also be reflected in the matter of credits,

(Testimony of Arthur J. Sherrill.)

and unless we can see an improvement very shortly we will either be forced to shorten our stocks, or else the factory will have to come to our assistance by taking over some of the larger accounts for us. We took this matter up with Mr. Fitzgerald, who felt sure that the factory would come to our assistance if we found it necessary to call on them. We have been forced to sell the line on such a small margin of profit that we cannot stand to do any very extensive credit business. We were forced into giving longer discounts than we wished thru the former policy of the company in quoting these extremely long discounts when working the territory direct from the factory. Almost every town of any size in our territory has been worked by Mohawk representative who quoted 25-5-5-5—in some cases to some dealers having no rating whatsoever.

We note you are now in position to furnish truck sizes, and we wonder if it would not be possible for you to consign us a set of the two larger sizes, we having already ordered some 36x6. We would like to put these tires on exhibition in our uptown store, and feel sure that we can work up some nice business in that line. If conditions were normal we would not hesitate to place an order for these tires, but as it is it is going to keep us jumping to meet our obligations without taking on anything extra.

By the way, no doubt there are a number of Shriners in your organization, and at this time we

(Testimony of Arthur J. Sherrill.)

would like to extend to them, thru you, a cordial invitation to visit our city during the Convention to be held here this month. We would like in particular to have yourself come, if you find it possible to do so. We believe you could combine business with pleasure most satisfactorily. We have several very important topics to discuss with you, which cannot be very well taken up by mail, and we feel sure this is the oportune time to take them up.

Trusting we may have the pleasure of a visit from you, we are,

Yours very truly,

Munnell & Sherrill,

AJS:D

By

Letter June 9, 1920, defendant to plaintiff, offered in evidence, received without objection and marked "Defendants' Exhibit 18."

Defendants' Exhibit 18

June 9, 1920.

Mohawk Rubber Co.,

Akron Ohio.

Attention Mr. Brooks,

Gentlemen:

Credit Manager.

We have your favor of the 4th in regard to trade acceptances, which we mailed you, maturing in July and August, and note your suggestions that we be charged interest on these from June 10th to the due date. Considering all the conditions under which we are operating at the present time, if you feel this charge to be in order, we will gladly accept it. We

(Testimony of Arthur J. Sherrill.)

feel, however, that because these tires were purchased by us at old prices should not work against us, as we have yet to find any one who has bought a tire at the advanced price. This applies, of course, to the high list tires, such as Kelly-Springfield and Hood.

We are hoping for improved conditions, however, and it may be by the time these acceptances are due that the tire business will be back to normal.

Yours very truly,

Munnell & Sherrill.

EJM-D

Letter June 23, 1920, defendant to plaintiff, offered in evidence, received without objection and marked "Defendants' Exhibit 19."

Defendants' Exhibit 19

June 23, 1920.

Mohawk Rubber Co.,
San Francisco, Cal.

Attention Mr. Fitzgerald.

Gentlemen:

Replying to yours of June 21st with reference to Mr. Rodgers of the Gas Company, will say, that I called on him the other day as well as Mr. Strange, and Rodgers informed me he received a letter from the Mohawk Rubber Co., in which they had implied that he doubted the statement you made regarding the Northwestern Gas & Electric Co. having a contract with Mohawk, and he replied to the Mohawk

(Testimony of Arthur J. Sherrill.)

Company to the effect that he had never made such a statement, and from the way he handled the subject I am afraid we have rather antagonized him.

As yet he has received no instructions from headquarters regarding this contract, and I would suggest that you endeavor to have the Northwestern Company take up the matter with him, and do not allow the factory to write him any further in the matter, as to do so would no doubt only complicate matters more.

Had a promise out of Strange for the first order he had for tires.

Business is simply shot to pieces, and we have had to take back most of the tires we sold on account of our customers being unable to meet their payments.

Yours very truly,

Munnell & Sherrill,

AJS-D

By

Letter June 25, 1920, defendants to plaintiff, offered in evidence, received without objection and marked "Defendants' Exhibit 20."

Defendant's Exhibit 20

June 26, 1920.

Mohawk Rubber Co.,
San Francisco, Cal.

Attention Mr. Fitzgerald,
Gentlemen: Pacific Coast Manager.

You probably have been wondering why check has not been mailed you covering that part of our

(Testimony of Arthur J. Sherrill.)

account, which has not been closed by trade acceptance. In answer, will say, that we have been receiving more tires back from our customers during the past thirty days than we have sent out, and we find ourselves loaded to the guards with stock, and up against a stone-wall refusal from our bank for any more assistance. They take the stand it is time for the Eastern manufacturer to carry a portion of the load. In other words, Oregon manufacturers of lumber products, fruit and salmon canners are being obliged to accept paper from their Eastern customers, while it has been the custom for the Eastern manufacturer to demand cash for materials which have been shipped to the Coast. They claim there is an actual money shortage in the Northwest on this account.

While we dislike sending any of the tires back to the factory, it is absolutely necessary that we be given sufficient time in which to dispose of them, or have them taken off our hands in filling orders which you have from other points in the Northwest or California. There is no tire business here. We have a very complete line of sizes, and are especially long on some of the popular sizes, which other manufacturers are supposed to be short on. This includes Ford sizes 32x4, 33x4 and 34x4 in both Cords and Fabrics.

We would be very glad to keep the tires and use our best efforts to dispose of them, but as mentioned

(Testimony of Arthur J. Sherrill.)

above will have to look to you for help in the way of some method of payment which we are able to handle.

Please let us have your views on the subject, and awaiting your reply, we are,

Yours very truly,

Munnell & Sherrill,

EJM-D

By

Letter of June 29, 1920, defendant to plaintiff, offered in evidence, received without objection and marked "Defendants' Exhibit 21."

Defendants' Exhibit 21

June 29, 1920.

Mohawk Rubber Co.,
San Francisco, Cal.

Attention Mr. Fitzgerald.

My Dear Fitz:

Enclosed letter from Miles & Clark explains itself. Will say, however, that they have had very poor luck with the tires they have used on their own machines so far. Bear in mind they are using all 32x4 Cords on Templar cars, which are four cylinders and considerably lighter than most cars using 32x4, as well as being low horsepower, being only rated at 18 horsepower. We are also enclosing copy of our reply to them, and would like to hear from you on the subject.

Needless to say, we are having a pretty tough time of it with the tire line. We have just reversed the usual state of affairs, as we are now receiving

(Testimony of Arthur J. Sherrill.)

85 per cent of our tires back instead of having that amount stay sold, and in addition to having most of our tires returned on account of the dealers not being able to pay for them, we are now confronted with situations like that of Miles & Clarke, who have several thousand dollars worth of tires, most of them still unpaid for, and who are likely with the advent of defective tires to return their stock to us any day.

We did not believe it was possible to have such a complete reversal of business conditions as we have found this spring. We are glad to say that it applies to the tire line alone, as we would be in mighty bad shape if our other business was not holding up for us. The situation is so bad that we have found it advisable to take all tires back rather than extend additional credits, as we believe it good business to have the goods in our store rather than doubtful accounts.

It is going to be up to the factory to help us out in this matter, either by an extension of credit, we to pay interest on past due accounts, or they will have to relieve us of part of our stock.

The writer leaves for California, either the latter part of this week or first of next, and intends to work everything thoroughly on the way down, but cannot hope for very much business out of Willamette Valley, as they have had no gas practically the entire spring, with the result that most of them have all the stock they need.

(Testimony of Arthur J. Sherrill.)

Hope to see you when I reach San Francisco, which will be about two weeks after leaving Portland. In the meantime, we would welcome any suggestions you may have to make in regard to relieving this situation.

Yours very truly,

Munnell & Sherrill,

AJS:D

By

Q. (Mr. Liljeqvist) Do you know what the trouble was as explained in this letter to them, and will you say whether you ever took this up with the factory?

A. Yes.

Mr. BISCHOFF: I don't see the materiality of Clarke & Miles, the complaint they were not able to use them. I don't see that has reference to any issue here.

COURT: I don't think that it has any materiality here; it occurred long prior to this settlement.

Q. Those letters you wrote to them in reference to having tires on hand and which are referred to, where they note the condition, will you state without going into detail just what the situation was? Just what the reason was you had accumulated this stock of tires?

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial, occurring long prior to the settlement of December 2, 1920, and the condition couldn't possibly affect the issue raised by the pleadings.

(Testimony of Arthur J. Sherrill.)

COURT: What do you claim for it?

Mr. LILJEQVIST: The correspondence, the course of correspondence—

COURT: I don't see what the correspondence has to do with this case prior to the settlement in 1920 when the notes were given.

Mr. LILJEQVIST: Letter of September 29, 1920, offered.

Marked "Defendants' Exhibit 22."

Defendants' Exhibit 22

Sept. 29, 1920.

Mohawk Rubber Co.,

San Francisco, Cal.

Gentlemen:

When Mr. Fitzgerald was here recently he promised to let us know what disposition to make of tires that we desire to return, and as we have decided to return a number of casings we would be glad to have you instruct us where to send them.

Yours very truly,

Munnell & Sherrill,

AJS-D

By

Q. Now, Mr. Sherrill, what was this statement Mr. Fitzgerald made to you that you have referred to, when he was up here in Portland?

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial. All controversy that they had and all arrangements were finally disposed of by their settlement in which they agreed to the return of a certain part and the payment of the balance by means of five notes.

(Testimony of Arthur J. Sherrill.)

COURT: There is a controversy here as to whether there was an agreement on the part of the plaintiff to take or make a rebate on the tires that were on hand at the time the notes were given.

Mr. LILJEQVIST: Our position is, when we got that settlement in December, if they hadn't agreed to either take them back, or allow us to sell them on spring dating terms, upon which we would get the benefit of cut in prices, we would have returned the whole stock. We claim this is in line with the correspondence and talks we had with them.

COURT: You may read the letter.

Mr. LILJEQVIST: I have read the letter. I ask what was the conversation referred to in the reference in the notes?

Q. You said in your letter when Mr. Fitzgerald was here recently he promised to let us know what disposition he wished to make of tires we desired to return. What was that conversation you had with Mr. Fitzgerald when he was here?

A. Regarding the return of tires?

Q. Yes, in the summer of 1920, some time in the latter part of June.

A. At that time we didn't know just where we would send the tires to, whether we would ship them to some other distributor or back to the factory, or to San Francisco branch, or to Los Angeles, or wherever they might wish the sizes which we would have on hand to give them.

(Testimony of Arthur J. Sherrill.)

Q. Was he going to send you instructions with reference to that matter?

A. Yes, sir.

Q. Was the matter cleaned up in any way in reference to the return of these tires, until Mr. Fitzgerald came back shortly before the first of December, 1920, when the notes were given?

A. Well that was—I don't believe that it was. I believe that December was the time that we finally decided on sending back the tires.

Mr. LILJEQVIST: I offer letter of October 18th.

Mr. BISCHOFF: Same objection to that; doesn't deal with the question of rebates, or agreement for rebates, or dating orders, or anything of the kind. It is before the settlement, and deals with nothing that is involved in the controversy. I wish to note an exception to the admission of all these letters prior to the December settlement.

Marked "Defendants' Exhibit 23" and read.

Oct. 18, 1920.

Mohawk Rubber Co.,

Akron, Ohio.

Attention Mr. B. J. Brooks,

Gentlemen:

Credit Manager.

We have your letter of the 12th in reference to our account, and we regret to advise conditions here do not warrant the optimistic feeling which you seem to have for the trade. There is nothing left to happen in the tire business as far as Oregon

(Testimony of Arthur J. Sherrill.)

is concerned. We looked forward to a nice fall business, as the gasoline situation has eased up, but instead of having our usual fall weather, we have had steady rain for the past six weeks, which has put a stop to any thought of touring. In addition, some of the tire companies have been reducing prices, with rumors of other reductions in the air, so that it has put a stop to buying.

We are able to take care of your October 10th Trade Acceptance for \$4900, and are corresponding with your San Francisco branch at the present time in the hope that they will give us shipping directions on a portion of our over-supply of stock. If this can be arranged, it will put our account in very fair shape, and we will endeavor to whittle on it until it is cleaned up entirely.

Yours very truly,

Munnell & Sherrill,

EJM-D

By

Mr. LILJEQVIST: Now we offer in evidence letter of October 26, 1920, from plaintiff to defendant.

Mr. BISCHOFF: Same objection and exception. Marked "Defendants' Exhibit 24."

Defendants' Exhibit 24

Akron, Ohio, Oct. 26, 1920.

Munnell & Sherrill,

40 First St., Portland, Oregon.

Gentlemen:

We are certainly sorry to hear that conditions.

(Testimony of Arthur J. Sherrill.)

instead of improving this fall, have taken a turn for the worse. There is a jinx on the tire business this year. We still feel as we did a while ago, when we told you that we would rather have you keep the surplus stock which you have and take care of your account as you can, than to have us both put to the expense and trouble of returning a lot of tires to San Francisco. We are writing to our San Francisco branch to this effect and shall hope to receive substantial payments from you as you can make them.

Very truly yours,

The Mohawk Rubber Company,

B. J. Brooks,

Credit Manager.

BJB:LB

Dic. 10-23-20.

Mr. LILJEQVIST: Telegram sent them, and your reply.

Mr. BISCHOFF: Same objection.

Marked "Defendants' Exhibits 25 and 26."

Portland, Ore., Nov. 3, 1920.

Mohawk Rubber Co.,

Akron, Ohio.

Are ready to return sufficient tires to cover open account as agreed with Fitzgerald, but at his suggestion have held these for shipping instructions from factory. If branch stocks do not warrant return at this time we will ware-house at no expense until you wish them shipped. Absolutely necessary we get account straightened out at once.

Munnell & Sherrill.

Charge.

(Testimony of Arthur J. Sherrill.)

Defendants' Exhibit 26

Akron O Nov 4-20

Munnell and Sherrill,

Portland, Ore.

Your wire third hold tire writing today.

Mohawk Rubber Co.

Mr. LILJEQVIST: Letter of November 13, 1920, offered in evidence and marked "Defendants' Exhibit 27."

Defendants' Exhibit 27

Nov. 13, 1920.

Mohawk Rubber Co.,

Akron, Ohio.

Attention Mr. M. E. Mason.

Gentlemen:

Acknowledging receipt of your letter of November 9th, it would seem that there has been considerable misunderstanding in this matter due to the factory not being aware of the arrangement between the San Francisco Branch and ourselves; and also that you evidently have taken it that we intended shipping back our entire stock of tires. receiving credit for them at the new price. We have never had any intention of doing this and only wish to handle the matter as Mr. Fitzgerald had made arrangements with us to do.

Some time in July, the writer made a trip to San Francisco, and while there arranged with Mr. Fitzgerald to return sizes we were overstocked on to apply on our open account. By the way, this

(Testimony of Arthur J. Sherrill.)

included repair material as well as tires. We further decided that it would be good policy to sell stock to other distributors in the Northwest, which are Geo. A. Lowe, Jensen, King, Byrd and Rubber Service Company, at a price which would be slightly better than they could buy them for direct from the factory. In this manner, we could reduce our stock and be able, in turn, to reduce our open account with the factory. There was nothing uncertain at all about this agreement. The writer wired Mr. Munnell, also wrote him direct from your office, showed Mr. Fitzgerald copies of what was sent.

Later on, we received orders from both Jensen, King, Byrd Co. and Rubber Service Company for tires which we filled. And we also, in compliance with our agreement, shipped a certain number of tires to San Francisco and received credit at the new price. Further, all invoices since then have been stamped "No freight allowance, exchange accommodations." Therefore, it would appear to us that this matter was pretty fairly understood in the San Francisco office.

Our sole reason for not shipping more tires to San Francisco was that we are requested, by Mr. Fitzgerald, to first allow him to take the matter up with the factory in order that they might have shipment to some other point if so desired.

The matter of further shipments was held in abeyance until we felt that, with the prospect of a

(Testimony of Arthur J. Sherrill.)

change in prices and the further fact that our open account was getting larger all the time, it was time we should know definitely what was to be done with these tires; hence, our taking up these matters with you direct, with the resulting exchange of telegrams and letters.

You suggest our disposing of these tires at cost. We can only reply, that is what we have been endeavoring to do for a long time. In fact, we have sold practically all of the tires this season at the old list, and we know of no way that we can increase our sales, as we certainly can't do it by cutting prices. The fact of the matter is, the public is not buying tires at the present time. If you know of any one in the market for Mohawk tires at anywhere near our cost, we will certainly appreciate your putting us in touch with them. In the meantime, we are willing to hold the matter open until Mr. Fitzgerald comes north, but it must be with the understanding that the agreement he made with us, which applies only to tires purchased at the new list, will have to stand.

While we naturally would like to continue the line, as once a distributor takes on an agency, it is unwise to discontinue only as a last resort, yet we are frank in saying that the line has not proven satisfactory from a quality standpoint. We have not brought up this matter before as we felt that the condition of the market has a great deal to do with the complaints, but we are forced to admit

(Testimony of Arthur J. Sherrill.)

that the quality of the tires has been a disappointment, and we want to say to you that we have not on our books today a single satisfied customer, and, in fact, have had a continual fight to retain such trade as we have established. We don't believe that we have kept as much as 25 per cent of the accounts started.

We have endeavored to take care of our troubles on this end and have only passed on a very small part of the adjustments to the factory, handling by far the majority of them ourselves.

We mention this, having in mind the paragraph in your letter reflecting upon the desirability of our account, and to let you know that the matter has not been entirely one-sided.

We regret exceedingly if Mr. Fitzgerald has exceeded his authority in this matter, but can only say in conclusion that our understanding of it is very definite and we, too, have certain rights we intend to insist on.

Yours very truly,

Munnell & Sherrill,

By

Mr. LILJEQVIST: Letter of November 15, 1920, offered in evidence and marked "Defendants' Exhibit 28."

(Testimony of Arthur J. Sherrill.)

Defendants' Exhibit 28

San Francisco, Cal., Nov. 15, 1920.

Munnell & Sherrill,

Portland, Oregon.

Gentlemen:

This will advise that the writer will arrive in your city Friday morning, the 19th inst.

Yours very truly,

Mohawk Rubber Co. Inc.

S. F. Branch,

By W. G. Fitzgerald,

Pacific Coast Manager.

Mr. LILJEQVIST: Letter of December 31, 1920.

Mr. BISCHOFF: We object as incompetent, irrelevant and immaterial. This is another attempt to get evidence to the jury on this question of defective tires, which Mr. Liljeqvist has very industriously attempted to bring here, where there is no issue of that raised in the pleadings.

COURT: Reference to anything else but defective tires?

Mr. BISCHOFF: I don't see anything else of any sort material to any issues raised by the pleadings.

Mr. LILJEQVIST: Question of adjustment; part of the correspondence; they have offered part.

COURT: It is not necessary to have all of the correspondence except as it affects this case.

Mr. LILJEQVIST: Very well. Letters of De-

(Testimony of Arthur J. Sherrill.)

cember 21st, 1920, and January 8, 1921. I will ask to have identified.

Defendants' exhibits for identification, 29 and 30.

Mr. LILJEQVIST: And in reference to this same matter, their letters of January 4th and January 13th on this particular thing.

Mr. BISCHOFF: Objected to on the same ground that we made to the last letters.

COURT: Has reference to defective tires.

Marked "Defendants' Exhibits 31 and 32" for identification.

Mr. LILJEQVIST: We offer their letter of May 9, 1921.

Marked "Defendants' Exhibit 33."

Defendants' Exhibit 33

San Francisco, Cal., May 9, 1921.

Munnell & Sherrill,

40 First St., Portland, Ore.

Have heard nothing relative price reduction. Will keep you posted. Fitzgerald due Portland Monday sixteenth.

Mohawk Rubber Co.

Q. Mr. Sherrill, is this the price list showing reduction that came out on that date, November 10th?

A. Is that the date of it?

Q. It is May 10, 1921.

A. Yes, sir.

Q. That is the one the company sent you?

(Testimony of Arthur J. Sherrill.)

A. Yes.

Q. And you received this list shortly after the telegram of the 9th, when they said there was no information on the question of price changes?

List offered in evidence and marked "Defendants' Exhibit 34."

Defendants' Exhibit 34

PRICE LIST

Effective May 10, 1921

CORD PRICES

Size	Non-Skid Cord	Ribbed Cord	P. G. Gray or Red Tubes
30x3½ C.	\$32.00		\$3.35
32x3½ D.	40.00	\$39.00	3.60
32x4 D.	51.50	50.20	4.35
33x4 D.	52.50	51.20	4.50
34x4 D.	53.50	52.15	4.65
32x4½ D.	58.20	56.75	5.45
33x4½ D.	59.00	57.50	5.65
34x4½ D.	60.00	58.50	5.75
35x4½ D.	62.80	61.25	5.90
36x4½ D.	64.10	62.50	6.10
33x5 D.	72.50	70.70	6.50
34x5			6.70
35x5 D.Q.	75.00	73.15	6.85
37x5 D.Q.	80.00	78.00	7.35
36x6 D.	120.00		14.40
38x7 D.	170.00		21.60
40x8 D.	215.00		27.00

(Testimony of Arthur J. Sherrill.)

FABRIC PRICES

Size		Non-Skid	Ribbed	P. G. Gray or Red Tubes
28x3	C.	\$16.50		\$2.50
30x3	C.	17.00	\$16.15	2.65
30x3—3½	Combination			2.80
30x3½	C.D.	21.00	19.95	3.35
31x3½	C.	23.00		3.55
32x3½	C.D.	26.00	24.70	3.60
34x3½	Q.D.	28.00		3.90
31x4	C.	30.00	28.50	4.20
32x4	C.Q.D.	33.00	31.35	4.35
33x4	C.Q.D.	34.50	32.75	4.50
34x4	C.Q.D.	36.00	34.20	4.65
35x4	Q.D.	38.00		4.85
36x4	C.Q.D.	40.00		5.00
32x4½		41.20	39.15	5.45
33x4½	Q.D.	43.00		5.65
34x4½	C.Q.D.	44.20	42.00	5.75
35x4½	C.Q.D.	46.00	43.70	5.90
36x4½	C.Q.D.	47.00	44.65	6.10
37x4½	Q.D.	49.00		6.40
33x5				6.50
34x5				6.70
35x5	Q.D.	54.00	51.30	6.85
36x5	C.Q.	57.10		7.20
37x5	C.Q.D.	58.00	55.10	7.35
36x5½	C.	70.00		8.75

(Testimony of Arthur J. Sherrill.)

37x51½ C.	68.00	8.50
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38x51½ Q.	64.20	8.25
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Mr. LILJEQVIST: I offer letter of June 18th, showing when Mr. Fitzgerald will be there, to help fix the date.

Marked "Defendants' Exhibit 35."

Defendants' Exhibit 35

San Francisco, Cal., June 18th, 1921.

Munnell & Sherrill,

40 1st St., Portland, Oregon.

Gentlemen:

The writer wishes to advise that he expects to leave the city Tuesday night for his regular trip north and expects to arrive in Portland Thursday morning.

Anticipating the visit with much pleasure, we are,

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:RD

Dict. 6-17

Mr. LILJEQVIST: Letter of September 21st.
We offer this letter.

Marked "Defendants' Exhibit 36."

(Testimony of Arthur J. Sherrill.)

Defendants' Exhibit 36

September 21, 1921.

Mohawk Rubber Co.,
Akron, Ohio.

Gentlemen:

On instructions from Mr. Fitzgerald we have transferred practically all of our stock of Mohawk Tires to the American Tire & Rubber Company. We are sending the numbers to San Francisco, asking that they credit our account for same.

We regret very much that the factory has to make this move. However, we do not doubt but that it is for the best for all parties concerned, and have no complaint whatsoever to make of the treatment we have received from the Mohawk Rubber Company.

We fully realize that Mohawk tires are entitled to a volume which we are unable at this time to give, and know that with the new arrangement they will get this volume.

We gladly assisted Mr. Fitzgerald in making this deal and feel that we furnished some help in landing it. We want to assure you that we shall continue to have a good word for the Mohawk Company in the future.

We made Mr. Fitzgerald a proposition that we felt would enable us to continue the line in conjunction with the American Tire & Rubber Company, and presume that he has put the matter up to you. If it could be worked out it would assure you of

(Testimony of Arthur J. Sherrill.)

\$40,000 to \$60,000 additional volume. It is particularly agreeable to the American Tire & Rubber Company inasmuch as it would mean co-operation from our retail store in place of competition.

As you are probably aware, we have a very desirable location for our retail store, and since it has become known that we are discontinuing the Mohawk line we have had several very well known lines offered us for distribution. It is going to be up to us to decide within the next few days what our policy will be. Would ask, therefore, that you let us know soon as possible if we can continue selling Mohawks in order that we may know just what course to pursue.

Assuring you of our best wishes, we are,

Very truly yours,

Munnell & Sherrill,

AJS-H

By

Mr. LILJEQVIST: The reply from Akron, in reference to that letter.

Marked "Defendants' Exhibit 37," and read.

Defendants' Exhibit 37

Akron, Ohio, Sept. 26, 1921.

Munnell & Sherrill,

40 First St., Portland, Ore.

Att'n Mr. A. J. Sherrill.

Dear Mr. Sherrill:

This will acknowledge your letter of September 21st, and we note that you have transferred the

(Testimony of Arthur J. Sherrill.)

greater portion of your stock to the American Tire & Rubber Company in accordance with instructions from Mr. Fitzgerald.

We also note what you say about the change in the representation and, frankly, the writer sees the change made with considerable regret. Yet, we do feel that we have got to do something to increase our business in that territory, and we cannot see how we could depend on you for a betterment of conditions during the next year if at all.

You have had hard luck in the last two seasons, and the writer lays a considerable portion of it to the tendency to speculate on the rise in prices. Had this advance in prices taken place and been maintained with the normal business conditions, undoubtedly this speculation would have made some money for you. As it was, it turned out disastrously for you and for us as well. However, that is all past history and it cannot be helped. But the writer will say that out of all of our distributing customers, you are the only one that got into this sort of a difficulty, and, while all of them had fair stocks on hand, they managed to work out of it with little or no loss; and our main difficulty was the lack of business while they were undergoing the process of cleaning up their stock. From the first of July, 1920, on thru the balance of the year, business from our larger distributors was light. From the first of July this year up to the present time it has been good.

(Testimony of Arthur J. Sherrill.)

With reference to the keeping of the line for local sale, the writer has not received as yet full information from Mr. Fitzgerald regarding these changes. He had a letter last Saturday that covered a considerable portion of the proposition and in this he mentioned that he thought that arrangements could be made to have you continue the line; and so far as we are concerned, we shall be mighty glad to have you do it. However, whether or not it can be satisfactorily arranged depends to a considerable extent upon the third party to the proposition; but from what Mr. Fitzgerald wrote, they were favorable to having you continue the line in a local way, and we really hope that it may be fixed up in that manner.

Naturally, you will understand that at this distance from your city and with more or less incomplete information and with a third party to whom we cannot talk, to be considered, the whole matter is something that will have to be handled by Mr. Fitzgerald; but so far as our own inclination is concerned, we shall be glad to see you continue the line if it can be satisfactorily arranged to all parties.

We wish to thank you for the help given Mr. Fitzgerald and can assure you that nobody regrets more than we do your unfortunate experience in the last year; and we certainly hope that you have reached the turning point and with a general resumption of business, which we can reasonably ex-

(Testimony of Arthur J. Sherrill.)

pect within the next few months, you are going to retrieve yourselves and get the reward that hard work and fair dealing should receive.

If for any reason you should not be able to continue the sale of Mohawk tires, the writer would be glad to give you any advice or help that he can in deciding what you shall take in its place; and he will give you this advice without prejudice, giving you the facts as he sees them thru reports from the entire country and letting you make your own decision. We hope, however, that some satisfactory arrangement may be made locally.

Yours very truly,

The Mohawk Rubber Company,

M. E. Mason,

MEM:DH

Sales Manager.

Q. He states here, the writer lays considerable portion of your hard luck to your tendency to speculate on the rise in prices. Will you tell the jury whether or not there is any accuracy in that statement? Did you speculate in the rise in prices in any respect?

A. No, we did not.

Mr. LILJEQVIST: You can go into details if you want to. We offer this letter.

Letter October 12, 1921, defendant to plaintiff.
Marked "Defendants' Exhibit 38."

(Testimony of Arthur J. Sherrill.)

Defendants' Exhibit 38

Oct. 12, 1921.

Mohawk Rubber Co.,
1436 Van Ness Ave.,
San Francisco, Cal.

Gentlemen:

We have just received your wire and were certainly surprised at its tone. We have never shipped any tires to San Francisco, but did turn over a large portion of our stock to the American Tire & Rubber Company on the written instructions from Mr. Fitzgerald, who was here at the time and who knew what Mr. Cassidy was going to receive, and it is our understanding that he gave Mr. Cassidy the privilege of keeping the tires at an extra discount or returning them to the factory.

We have just called up Mr. Cassidy, who verified this and informs us that he shipped a quantity of tires to San Francisco, so, no doubt, this is the shipments you referred to in your wire.

We take it for granted that Mr. Fitzgerald is out of the city and he has not informed you fully regarding this transaction, and when you get in touch with him no doubt the matter will be explained to your full satisfaction.

Awaiting your further favors, we are,

Yours very truly,

Munnell & Sherrill,

By

AJS:A

(Testimony of Arthur J. Sherrill.)

Mr. LILJEQVIST: Letter of November 5, 1921, is offered.

Marked "Defendants' Exhibit 39."

Defendants' Exhibit 39

San Francisco, Cal., November 5, 1921.

Munnell & Sherrill,

Portland, Ore.

Attention: E. J. Munnell.

Gentlemen:

This will acknowledge your letter of the 27th ult., regarding the tires which you turned over the American Tire and Rubber Company and which eventually found their way back to this city.

You will remember at the time the writer was negotiating with the other concern that it was generally supposed that they would be able to conveniently relieve you of your stock or that part of same which was of the popular sizes and in a salable condition and the matter of our giving you credit for this particular stock was contingent upon the other concern retaining same. However, it so developed that you not only turned over to them some types and sizes which were popular sellers but took the opportunity of unloading your entire stock regardless of sizes, types or condition, consequently the major portion of same was shipped back to this point and as mentioned to you in our recent correspondence, the matter of crediting your account with the stock depended solely on the other concern retaining same and as they did not

(Testimony of Arthur J. Sherrill.)

do this, then the stock reverts back to your ownership and we have asked you in each one of our letters to give us shipping instructions or advise whether you desired us to take in this stock at the figures previously quoted.

In our offers to take in this stock at 60 per cent net plus 5 per cent excise tax from the consumer's list, we can assure you should we accept the stock at the figure named we will absolutely make no profit on the transaction, but on the other hand stand considerable loss, and if you do not desire to accept our offer, then it will be withdrawn and you can take care of the returned stock to suit your convenience.

We also want to call your attention to the promises made to the writer on his recent visit to the effect that you would immediately send us a check covering your current purchases for the past several months. We have not so far seen a remittance from you covering these amounts and you have, no doubt, sold this merchandise and have received payment for same. Therefore, we shall expect you to take care of your obligations without further delay.

This entire matter has now dragged along to the point where we shall expect immediate action and if you do not desire to take care of same according to the writer's suggestions, then the entire proposi-

(Testimony of Arthur J. Sherrill.)

tion will be turned over our factory for attention.

Yours very truly,

Mohawk Rubber Co. of N. Y. Inc.

San Francisco Branch,

By W. G. Fitzgerald,

Pacific Coast Manager.

WGF:RD

Dict. 11-5

Q. I hand you herewith a list, and ask you if that is a list of price decline that came down November 15, 1921, sent to you by the Mohawk people?

A. I presume that is the list, yes, sir.

Q. Here is copy of letter of November 23rd. Do you know whether you wrote that and—and also—

A. I am pretty sure I didn't write it.

Q. Did you write this one of November 21st? Can you tell by the corner?

A. Well it bears my initials, and I possibly signed it, but I don't believe I wrote it.

Q. Now Mr. Sherrill, this list that Mr. Bischoff called for I hand to you and want you to state if you can, so to get it before the jury, what portion of that list is in the handwriting of Mr. Fitzgerald?

A. The writing in ink.

Q. And whose handwriting is the lead pencil?

A. I couldn't say. I think Mr. Munnell's or Mr. Auspach's.

COURT: What is that, list of tires that was made at the time of transfer of the business?

Mr. LILJEQVIST: Yes.

(Testimony of Arthur J. Sherrill.)

Q. And the pencil notations by the left of the figures. Do you know whose handwriting that is in?

A. I do not. I believe that was made at the time by Mr. Fitzgerald. I wouldn't say for sure.

Mr. LILJEQVIST: Now we offer this list in evidence, your Honor, to show the inventory made by Mr. Fitzgerald of the stock down there, and also to show knowledge of the stock and its condition, and amount and quality.

Marked "Defendants' Exhibit 40."

Defendants' Exhibit 40

BOWERS RUBBER WORKS

Portland, Oregon

2	28x3	N S	Fabrics	16.50	33.00
7	30x3 $\frac{1}{2}$	"	"	21.00	147.00
1	34x3 $\frac{1}{2}$	"	"	28.00	28.00
37	32x3 $\frac{1}{2}$	"	"	26.00	962.00
4	31x4	"	"	30.00	120.00
5	32x4	"	"	33.00	165.00
2	33x4	"	"	34.50	69.00
10	34x4	"	"	36.00	360.00
2	35x4	"	"	38.00	76.00
2	36x4	"	"	40.00	80.00
2	37x5	"	"	58.00	116.00
6	32x4 $\frac{1}{2}$	"	"	41.20	247.20
5	34x4 $\frac{1}{2}$	"	"	44.20	221.00
7	35x4 $\frac{1}{2}$	"	"	46.00	322.00
1	36x4 $\frac{1}{2}$	"	"	47.00	47.00

(Testimony of Arthur J. Sherrill.)

3	30x3	Rib	16.15	48.45
42	30x3½	"	19.95	837.90
33	32x3½	"	24.70	815.10
12	32x4	"	31.35	376.20
21	33x4	"	32.75	687.75
17	34x4	"	34.20	561.40
6	35x4½	"	43.70	262.20
1	37x5	"	55.10	55.10
13	31x4	"	28.50	370.50
7	30x3	Little Chiefs	14.50	101.50
13	33x4	Rib Cords	51.20	665.60
13	32x4	" "	50.20	652.60
26	32x3½	" "	39.00	1014.00
9	35x4½	" "	61.25	551.25
8	35x4½	N S Cords	62.80	502.40
23	34x4½	" "	50.00	1380.00
7	33x4	" "	52.50	367.50
24	32x3½	" "	40.00	960.00
1	33x5	Rib Cords	70.70	70.70
2	34x4	" "	52.15	104.30
3	32x4½	" "	56.75	170.25
2	34x4½	" "	58.50	117.00
5	36x4½	" "	62.50	312.50
2	35x5	" "	73.15	146.30
1	37x5	" "	78.00	78.00
7	30x3½	N S Cords	32.00	224.00
4	32x4	" "	51.50	206.00
2	34x4	" "	53.50	107.00
3	32x4½	" "	58.20	174.60
1	36x4½	" "	64.10	64.10

(Testimony of Arthur J. Sherrill.)

3	33x4	"	"	72.50	217.50
4	35x5	"	"	75.00	300.00
3	36x6	"	"	120.00	360.00
1	38x7	"	"	170.00	170.00
1	40x8	"	"	215.00	215.00

Mr. LILJEQVIST: We offer letter of October 27, 1921.

Marked "Defendants' Exhibit 41" and read.

Defendants' Exhibit 41

October 27, 1921.

Mohawk Rubber Co. of N. Y. Inc.,

1436 Van Ness Ave.

San Francisco, Cal.

Att'n Mr. Fitzgerald.

Gentlemen:

It devolves upon the writer to answer your letter of the 24th, as Mr. Sherrill is out of the city. I have looked over all of the previous correspondence relative to this local transfer, and cannot see wherein we have failed to follow out your instructions to the letter.

In all of your letters you fail to make mention of this important part of this change in distribution, wherein you asked us on what terms we would be willing to share the territory with another dealer, and our reply that we would be willing providing you relieved us of our stock of tires at what they cost us. You recall having said that this would be very fair, and that you would go

(Testimony of Arthur J. Sherrill.)

ahead and see if you could close the deal with Cassidy. Being successful in that, you must recall having asked the writer to help Cassidy as much as possible in disposing of the stock we were to turn over to him, for the reason that you expected a large part of this stock would eventually be returned to San Francisco, and that you would have to book a loss on it, and wanted us to make it as light as possible.

Now we are not interested in the way this shipment was received by you, as the tires we turned over to the American Tire & Rubber Co. were all in good condition, practically all wrapped as they came from the factory, and all were receipted for by them in good order. We did not ship them to San Francisco nor do we know how they were prepared for shipment.

We are, however, interested in having you fulfill your part of the agreement, by sending us a credit memorandum to cover the rebate due us on account of the decline in price of May 10th, 1921, amounting to \$2633.36, also credit memorandum covering the tires turned over to the American Tire & Rubber Co. as per list of sizes and serial numbers mailed you on September 21st. Said credit memorandum to be priced at current list less the regular jobbing discount.

(Testimony of Arthur J. Sherrill.)

Awaiting the prompt receipt of these documents,
we are,

Yours very truly,

Munnell & Sherrill,

EJM-HAA

By

Q. Did Mr. Cassidy make any statement to you in the presence of Mr. Fitzgerald, with reference to the turning over of your tire stock to him, or any portion of it, and if so what did he say, and who was present?

A. Well at the time we entered into this matter with Mr. Fitzgerald, Mr. Cassidy was not present.

Q. I mean later.

A. Later on we made our—practically our arrangements with Mr. Fitzgerald on Saturday, and we were to meet with Mr. Cassidy Sunday, to arrange with him regarding the handling of the line in the City of Portland, through him, buying tires for our retail stores; also to submit a list of tires showing him what we were going to send up.

Q. In reference to turning over your stock to Cassidy, what did he tell you, if anything, with reference to what you could turn over, and later on what he would do with the stock which you delivered to him, if he desired?

A. The only conversation that occurred regarding our tires, with Mr. Cassidy, was that Sunday when Mr. Fitzgerald was present. Mr. Munnell, Mr. Fitzgerald, Mr. Cassidy and myself held a conference at Mr. Cassidy's store, for two reasons.

(Testimony of Arthur J. Sherrill.)

A. We were to take the list as we had it there, to show Mr. Cassidy what our stock consisted of. We were also to arrange with Mr. Cassidy, if possible to do so, for us to handle the line in the City of Portland, and naturally when we submitted the list to Mr. Cassidy we went over the various sizes, and Mr. Cassidy remarked about certain sizes of these tires, and Mr. Fitzgerald says, "Well," he says, "there is a few of these that will be slow to move, but take this stock in here, George, and what you can't sell at a later date return to us at San Francisco, and we will exchange stock for what you return."

Q. Some reference on cross examination was made to Mr. Cassidy first—before you sent the other tires to him when he sent his truck up—getting some few tires on special orders. Now I want to know just when that occurred in reference to the time these tires were turned over when he sent his truck up?

A. I believe that we have the dates there. I believe that there were two deliveries made to Mr. Cassidy of tires prior to this date, prior to the Saturday and Sunday when we got together. In other words, Mr. Cassidy—

Q. Was that before the letter of instructions even came?

A. That was before the letter of instructions.

Q. Then the tires you did deliver to Mr. Cas-

(Testimony of Arthur J. Sherrill.)

sidy before you got this letter of instructions, were delivered some time on what dates, to the best of your recollection?

A. Along about the 15th, it had been some time during the week, and around the 15th, 16th, 17th.

Q. Do you know how many tires you delivered to him at that time?

A. There were not very many, as I recall it, possibly half a dozen or a dozen tires.

Q. This conversation you had with Cassidy and Fitzgerald took place subsequent to that time, is that correct?

A. The conversation we had with Mr. Cassidy took place a few days later.

Q. Then this letter of instructions that he sent you, marked Plaintiff's Exhibit 7, that was sent to you even after that?

A. Mr. Fitzgerald told us to go ahead and send the tires to Mr. Cassidy, such sizes as we could give him, and as he needed them, and that when the deal was terminated that he would give us a letter of authority., and we delivered the tires and charged them back to the Mohawk Rubber Company, and they in turn charged them to Cassidy.

Q. Then the tires you delivered to Cassidy before you got this letter of instructions, those were charged back to the Mohawk Company?

A. Charged back to the Mohawk Rubber Company, yes, sir.

(Testimony of Arthur J. Sherrill.)

Q. And that was done pursuant to directions which he gave you orally?

A. It was.

Q. Then the tires you turned over to Cassidy, the lot of tires, was that turned over pursuant to this written instruction, Plaintiff's Exhibit 7, subsequently given?

A. We considered the deal was terminated, and that was our authority to deliver the balance of the stock.

Q. In your conference with Cassidy, did Cassidy inform you or say anything to you, and if so what did he say upon which you felt that you were authorized and justified in turning over these tires to him, when he sent his truck up? What was said by Cassidy?

A. The only time that we met with Mr. Cassidy was on that Sunday, and the only question that came up about tires, about the type of tires, the sizes, etc., was when we went through the list, and we called his attention to certain sizes which we were long on, and told him that if he was ordering a carload of tires to use that list to guide him by, and not to order too many of the sizes which we were going to turn over to him. There was certain sizes in there that we were long on, for instance, you will notice that there are thirty-four 4½ Cords.

Q. Now this entire list that Mr. Fitzgerald made up, was there any tires in that entire list

(Testimony of Arthur J. Sherrill.)

which you were directed by either Mr. Fitzgerald or Mr. Cassidy to keep yourself and not turn over to the American Tire & Rubber Company?

A. There was not.

Q. Was it understood that as far as this list was concerned any or all of the tires on that list could be turned over to the American Tire & Rubber Company?

A. That was understood.

Q. This was the list you had?

A. This was the list.

Q. Now Mr. Sherrill, when Mr. Fitzgerald was there, and when you turned over this list of tires to the American Tire & Rubber Company, what is the reason that you had for not turning over additional tires to the ones that you did turn over, sufficient to liquidate this \$2366 notes which is in issue, and which we claim was made by rebate of May 10, 1921?

A. Well, there were two reasons, one of them was that we were turning over sufficient tires to pay the amount of our indebtedness to the Mohawk Company. The second reason was that we were in the tire business more or less, and we thought we could make an arrangement whereby we could continue to sell the Mohawk tires, so that it was our endeavor to keep a representative stock. As near as possible we kept every size and every type of tire that we had in stock. We kept one or two of each size and description.

(Testimony of Arthur J. Sherrill.)

Recross Examination.

Questions by Mr. Bischoff:

Mr. Sherrill, this price list, this Exhibit 30, that is the list on which tires were to be sold to the retail trade, that is, to the consumers, the ultimate consumers?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. It does not represent the price which you are paying for them?

A. No, sir.

Q. You had a 40 per cent reduction from that?

A. Something like that, yes, sir.

Q. Now when you had your interview with Mr. Cassidy at his store on this Sunday that you spoke of, that was the only interview you had with him upon which you sent him merchandise?

A. That was the only interview, yes, sir.

Q. Now had Mr. Cassidy ever seen your stock of merchandise before that date?

A. No, sir.

Q. Did he ever see it after that date until you sent it over to him?

A. Not to my knowledge.

Q. The only thing that you were calling to his attention at that interview was the sizes as they appeared on that list?

A. Yes, sir.

(Testimony of Arthur J. Sherrill.)

Q. But as to what their condition was, of course this list disclosed nothing?

A. Mr. Fitzgerald knew the condition of the tires.

Q. I am talking about Mr. Cassidy's understanding of it. You haven't anything here to indicate what their condition was or how long you had had any of them in stock?

A. No, sir.

Q. Did Mr. Cassidy at that time tell you which of these tires you were to send?

A. He did not.

Q. The fact is, he never told you at any time what tires you were to send over with the exception of the small quantity that we spoke of before you actually turned them over?

A. Mr. Cassidy phoned us several times to get the stock up there as quickly as we could.

Q. All he told you was to get the stock up there?

A. The stock, yes.

Q. According to your statement?

A. Yes, sir.

Q. But as to what stock, or what portion of it, you made the selection yourself, that is, your firm did?

A. Yes, sir.

Q. Without inquiring of him whether they would accept it or not?

(Testimony of Arthur J. Sherrill.)

A. Yes, sir.

Q. Now Mr. Sherrill, I want to ask you to think back a moment again with respect to the preparation of this list which you say was written by Mr. Fitzgerald, and state if it isn't a fact that this list was made up from your stock cards in your office?

A. Absolutely not.

Q. You kept stock cards in your office?

A. We did.

Q. Were you present when that list was being written by Mr. Fitzgerald?

A. I was.

Q. And you saw him prepare that?

A. I saw him.

Q. Where did he write that?

A. In the front part of our office.

Q. Was anybody else there besides you and Mr. Fitzgerald?

A. Mr. Auspach was there.

Redirect Examination.

Questions by Mr. Liljeqvist:

Did Cassidy make any complaint to you that you didn't turn over any more tires to him than you did?

A. No, sir.

Q. Did he ever make any complaint to you about the tires you did turn over to him?

A. No, sir.

Q. What is the fact in reference to statement

(Testimony of Arthur J. Sherrill.)

in the letter they talked about, about this condition; what is the fact as to whether in handling the tire business some of these tires become—whether some tires are unwrapped as a part of your business; also what is the fact about whether any tires came from the factory or were furnished to you here in Portland unwrapped?

A. We occasionally have tires come with the wrappings off, particularly where they are re-shipped, for example, we would say they were originally from San Francisco. In handling the tires the wrapper occasionally comes loose and comes off the tire. It is only a small percentage; and also in selling tires we will occasionally take the paper off to show certain sizes to a customer. In any stock of tires where there are being sales made from stock you will find a few tires that are unwrapped.

Q. That particular one that is shown if not sold is just placed back in stock?

A. That is placed back in stock.

Witness excused.

H. A. AUSBACH, a witness called in behalf of the defendant, having been previously sworn, testified as follows:

Direct Examination.

Questions by Mr. Liljeqvist:

Mr. Ausbach, in reference to letter from the Mohawk Rubber & Tire Company requesting list to

(Testimony of H. A. Auspach.)

be sent of the tires on hand May 14, 1921, I will ask you to tell the jury whether or not you did personally send the Mohawk Tire Company to San Francisco a list of tires which you had on hand at the time of the price decline in May?

A. I did.

Q. Is this original carbon copy of that list?

A. I think it is.

Mr. LILJEQVIST: Have you the original?

Mr. BISCHOFF: That is the one you gave me.

Letter offered in evidence, marked "Defendants' Exhibit 42."

Defendants' Exhibit 42

SERIAL NUMBERS OF TIRES IN STOCK

May 14th, 1921.

2—28x3 N S Fabs

584046 583852

39—30x3 Rib Cl

588834 499406 489506 547883 547923 548020

547828 548399 547844 544310 544076 548307

544258 548092 547812 547882 548179 573439

547828 547884 547829 547831 547841 547833

548177 548094 547806 538322 544346 538479

499670 489327 494633 488893 499408 489395

589106 489222

9—30x3 N S Cl

584228 584230 584450 584227 498200 488691

495635 499456 498210

(Testimony of H. A. Auspach.)

55—30x3½ Rib Cl

426938	485681	409491	482333	508183	482753
497487	508333	480933	508336	485459	492745
597588	481446	497583	508324	482754	507178
482748	482328	482160	481326	482853	480384
485450	481445	508174	509218	494120	510123
508181	510121	510334	510454	510460	510129
510126	510122	510335	510976	511085	510978
459334	459045	459199	459550	424451	424828
509988	493464	429124	480099	482749	482158
510131					

114—30x3½ N S Cl

387542	521464	533765	533195	534404	533789
534595	534313	533382	534277	392281	522874
533785	534591	534596	534599	534594	534397
533009	534156	521933	533433	534124	534126
534295	533761	534048	533480	534052	534008
534050	534018	510641	533742	534154	534155
534309	531542	533744	533677	533759	534019
533914	533958	511923	534394	533748	533749
533194	532111	534049	534616	534396	534589
534556	534395	511589	534596	534006	533918
533260	533760	534586	534710	600034	534153
534590	534296	511696	534791	534592	534588
533259	534095	534009	534792	534779	534302
600061	600060	520100	533250	534593	533261
533258	534128	435125	534812	520100	533250
534593	533261	533258	534128	534125	534812
534815	534712	600095	599986	533257	470658

(Testimony of H. A. Auspach.)

471746	485882	475770	534276	510024	510045
432921	523440	522878	522220	523324	521442
523547	522232	522218	522877	523332	533197
533303	534017				

4—31x3½ N S

553710	555784	588266	588042		
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42—32x3½ Rib SS

452072	529211	418940	488359	451545	451949
451487	517949	515761	488156	489109	488797
432628	429967	438195	494771	424325	452073
433710	433856	432202	494703	495223	495397
494794	459018	429154	429299	250852	438214
418388	424607	478560	433011	429012	428945
437445	515789	488796	488360	514227	

50—32x3½ N S Fab

490209	462896	498035	556587	556826	556387
556544	556649	556936	556024	492463	490423
492268	492430	498583	490506	492361	492370
492754	492572	556460	556937	556906	556545
556336	556784	556388	480071	480561	488180
556937	556085	556730	556337	556869	556904
556219	478474	487233	489214	376560	475821
479076	605866	404870	471211	606146	391556
414130	492266				

6—34x3½ N S Fabs

607008	607034	607062	607058	599922	605206
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18—31x4 Rib Cl

481115	450928	487494	488515	451080	511310
460850	487493	485947	487194	488516	488076
488115	488038	481533	487130	486984	481114

(Testimony of H. A. Auspach.)

33—31x4 N S Cl

494143	390962	504969	505065	504943	504780
502640	505066	556222	555736	555859	504642
364777	504641	504782	504652	504942	504147
512176	555735	555921	555699	504667	503164
505144	502943	504639	502643	504193	503186
458261	494538	494819			

23—32x4 Rib SS Fab

459824	470854	489686	486848	488146	469756
470179	493281	533261	442703	461008	410369
454495	458934	488040	466269	469645	489883
580592	467964	483167	467725	466806	

23—32x4 N S SS Fabs

509109	509188	503029	501579	542624	542773
534083	547968	548218	498192	502797	502829
504675	508991	542468	547981	548049	548077
547906	591990	598503	414011	509274	

29—33x4 Rib SS Fabs

478895	570225	470561	471547	470995	479110
502053	543692	543772	543542	481829	470281
471469	471425	454254	498664	543846	543693
543541	543773	544003	469542	471757	465923
469860	472314	474204	489578	489979	

15—33x4 N S SS Fabs

539228	537943	537279	538956	538878	549313
534282	604126	604889	548933	548934	547759
537788	567827	539468			

25—34x4 Rib Fabs

482359	482172	481340	481622	479937	481342
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(Testimony of H. A. Auspach.)

499555	509820	508969	480941	480430	481704
481835	480958	452608	482548	480242	481504
482830	482253	480064	482942	482702	470623
394206					

23—34x4 N S Fabs

481256	505295	481609	481651	477402	504485
504862	503951	503261	469684	481654	504999
481610	481544	473893	508016	505364	503883
469067	463977	468217	433001	433429	

7—35x4 N S Fabs

573767	567905	579467	567862	522398	520723
585010					

6—36x4 N S Fabs

549513	550139	483423	485509	480843	552007
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10—32x4½ N S Fabs

518047	517663	518410	517577	557316	556537
551275	583876	551157	551187		

5—33x4½ N S Fabs

470548	471648	461917	408279	412689	
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2—34x4½ Rib Fabs

364828	331564				
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8—34x4½ N S Fabs

533942	396009	600878	600797	600790	350707
329563	600957				

7—35x4½ Rib Fabs

548246	514931	549346	514721	514743	548035
317161					

13—35x4½ N S Fabs

327333	519152	509117	537321	536916	515203
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(Testimony of H. A. Auspach.)

514724 514987 514933 514986 354185 376216
331960

3—36x41½ Rib Fabs

321114 321192 324439

4—36x41½ N S Fabs

440268 450133 297369 297019

7—37x41½ N S Fabs

549523 552004 578273 524901 525108 552567
525226

2—35x5 N S Q D

394658 600631

1—37x5 Rib Fab

227326

1—37x5 N S Fab

265204

22—30x31½ N S Cords

603073 603088 603098 603270 603192 603268
603193 603274 603285 603136 603558 602647
602648 602451 602452 602450 602495 602458
602466 603269 603141 586633 602677

32—32x31½ Rib Cords

547021 546732 546809 546330 546142 546859
545968 560793 560899 560118 547117 546991
546650 547049 546927 546240 561178 561086
560961 560827 560894 560910 561008 560797
560907 562329 575144 575123 575424 560898
456208 546859

39—32x31½ N S Cords

575058 575211 561472 561550 546955 546699

(Testimony of H. A. Auspach.)

546925	546106	547140	561354	547168	575320
561424	546828	546870	546892	546877	546825
547078	561557	546426	561383	561529	575475
575720	575715	575747	575697	575205	547167
561503	561359	561497	575703	575708	575740
575679	575678	575309			

20—32x4 Rib Cords

545834	529574	544688	545598	540642	546246
545725	545587	527895	507103	529438	546075
544757	544988	545499	546134	545893	529367
527053	527015				

17—32x4 N S Cords

545575	546356	545106	545591	545175	545042
545670	545104	501337	505627	545572	527701
544841	545991	545797	545037	544898	545671
473491	476646	464273	545535		

20—33x4 Rib Cords

575239	576366	575819	506310	506256	545618
545814	506124	464508	559316	430555	545844
545815	545783	545784	414708	395443	401334
402967	393150				

27—33x4 N S Cords

546834	577101	577141	576913	577172	547077
577133	563569	576930	577204	544782	546884
546889	546752	546891	507885	546885	546902
546827	546831	500954	501173	501169	506392
506576	441282	437531			

18—34x4 Rib Cords

472592	464854	500965	501068	430438	439401
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(Testimony of H. A. Auspach.)

445403	411226	438894	432242	472649	562511
562360	476669	464395	562004	560469	476654

14—34x4 N S Cords

507774	507651	507350	507924	575333	575063
507649	507821	507649	507821	442033	575284
561308	476436				

3—32x4½ Rib Cords

530767	530929	496046
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4—32x4½ N S Cords

484387	595167	595394	595085
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6—33x4½ Rib Cords

529888	545842	546294	506231	526034	506277
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6—33x4½ N S Cords

527293	530838	530798	546879	576808	576748
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5—34x4½ Rib Cords

495734	608514	491536	491804	491536
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13—34x4½ N S Cords

546855	546916	491080	546835	602730	607394
607392	505761	505876	607393	501468	420491
608321					

10—35x4½ Rib Cords

455704	455849	526275	527306	524346	527596
429987	429964	503945	503862		

21—35x4½ N S Cords

545555	545661	545630	545561	545662	545522
545533	431783	495980	506128	455950	431843
496070	506043	506216	506512	506410	501336
491920	545548	505921			

(Testimony of H. A. Auspach.)

3—36x4½ Rib Cords

491596 475761 412156

4—36x4½ N S Cords

440791 439726 546296 547393

1—33x5 Rib Cord

547096

6—33x5 N S Cords

601155 593841 601126 595228 441872 562583

3—35x5 Rib Cords

652605 501500 576234

6—35x5 N S Cords

526804 526546 527074 526732 546668 608279

1—37x5 Rib Cord

507547

3—37x5 N S Cords

602109 506015 506451

Q. Letter was introduced written either by Mr. Munnell or Mr. Sherrill here, showing that list of tires which you turned over to the American Tire & Rubber Company was sent to the San Francisco office on September 21, 1921. Did you write that letter yourself on the typewriter?

A. Our letter with the intial HAA?

Q. Pardon me.

A. I don't know what letter you refer to.

Q. I show you a letter of October 27, 1921, marked "Defendants' Exhibit 41," and ask you to look at the last part of that letter and tell the jury whether or not you know whether that letter was sent—whether you sent it—typewrote it?

(Testimony of H. A. Auspach.)

A. Yes, I wrote that letter at dictation from Mr. Munnell.

Q. And will you state whether or not that refreshes your mind—when I had you here before you testified about mailing letters, but didn't remember the date, and I will ask you if anything in that refreshes your mind as to when it was?

A. Around September 21st.

Q. Within a month there you would have a fresher recollection than you would here a couple of years after?

A. Yes.

Q. You remember that letter going? You took the dictation and sent it?

A. Yes, sir.

Q. And the list you state there actually was sent?

A. It was.

Q. Do you remember when Mr. Fitzgerald came up here some time in the latter part of June, 1921?

A. Yes, I was present during—at the time of all of his visits here, practically all of them.

Q. Do you remember whether there was any conversation between the firm of Munnell & Sherrill and Mr. Fitzgerald with reference to rebates on tires, by reason of the cut of May 10, 1921?

A. Yes.

Q. Was that conversation with reference to the rebate which you were entitled to on the list of tires

(Testimony of H. A. Auspach.)

which you had on May 14, 1921, copy of which was sent to them, carbon of which is offered as Defendants' Exhibit 42?

Mr. BISCHOFF: I object to that question as embracing a legal conclusion, assuming he was entitled to something. That is for the Court to determine.

Mr. LILJEQVIST: I said conversation with reference to.

COURT: Reference to list of tires sent to San Francisco in May, 1921.

Mr. LILJEQVIST: Conversation with reference to rebate on the tires on hand when the cut of May 10, 1921, occurred?

A. Yes.

Q. Tell the jury what Mr. Fitzgerald said to Munnell & Sherrill at that time, to the best of your recollection?

A. To the best of my recollection Mr. Fitzgerald seemed to think—

A. I don't believe I can use the exact words.

COURT: The substance of it.

A. He said that he thought we were asking a little too much for rebate on account of that decline, and Mr. Munnell replied that he—that we were entitled to it, but he wanted to be fair in the matter; as far as I recall; and Mr. Fitzgerald suggested that the rebate be the amount of one of these notes.

(Testimony of H. A. Auspach.)

Q. Was that accepted by Munnell & Sherrill?

A. Mr. Munnell and Mr. Sherrill both accepted that.

Q. What?

A. Mr. Munnell and Mr. Sherrill both accepted that settlement.

Q. Do you remember how much they claimed they were entitled to by reason of the rebate?

A. Something in excess of \$4000 I believe is what it figured.

Q. Do you know of your own knowledge anything about what the understanding was with Mr. Fitzgerald in December when these notes were given and a bunch of tires returned at the time of this settlement, in reference to the tires that you then had on hand?

A. The tires that we then had on hand were to be kept in our stock and sold with Spring dating terms.

Q. What did Mr. Fitzgerald say then if anything with reference to protection against price decline, that either the dealers would get, or Munnell & Sherrill, or both. State in your own way.

A. On this particular stock that we retained we were to have the Spring dating protection and we in turn were to protect our dealers.

Q. Is that what Mr. Fitzgerald told you?

A. That is what Mr. Fitzgerald—the substance of what he—

(Testimony of H. A. Auspach.)

Q. Where was it that conversation took place in which Mr. Fitzgerald in substance said that to Munnell & Sherrill ?

A. In our office.

Q. And based upon that conversation what did Munnell & Sherrill do with reference to returning any stock and signing any notes?

A. It was concluded at that time that we were to return certain stock to San Francisco, and sign notes for the balance which we were to retain, and with the Spring dating terms.

Q. Then did the firm of Munnell & Sherrill try to interest dealers of the sale of stock based upon these terms?

A. They did.

Q. And then when this letter or telegram, followed by letter of May 10th showing price decline, came on, then this conversation which you have testified to, that took place with Mr. Fitzgerald at what place?

A. I don't understand the question.

Q. Where did this conversation take place later on after the price decline, with reference to the giving of credit to the amount of one note, that you refer to?

A. That was in our office.

Q. Did any conversation ever take place subsequent to that time and before the tires were turned

(Testimony of H. A. Auspach.)

over to the American Tire & Rubber Company, with reference to it?

A. With reference to—

Q. This credit you were supposed to get.

A. I think there was.

Q. Were you present?

A. I was present on most all occasions.

Q. Between them?

A. Between them, yes.

Q. Now after Fitzgerald went back and you had this conversation with reference to credit on the note, I want you to tell the jury whether or not Munnell & Sherrill wrote him in reference to the matter, to your own knowledge?

A. Wrote to Mr. Fitzgerald?

Q. Yes.

A. Regarding this rebate?

Q. Yes.

A. Yes.

Q. Is this a copy of the letter?

A. This is.

Q. Did you take this letter in dictation?

A. I did.

Q. Was it sent to the Mohawk Rubber Company?

A. It was.

Mr LILJEQVIST: Letter of August 15, 1921.
Marked Defendants' Exhibit 11.

(Mr. Liljeqvist reads Defendants' Exhibit 11.)

(Testimony of H. A. Auspach.)

Q. I hand you another letter of November 23, 1921.

A. Three of them are.

Q. Which three, give the exhibit numbers?

A. 13, 14, and 16.

Q. Then tell the jury whether you know of your own knowledge from the time this price decline was made in May, 1921, up to the end of this controversy, whether Munnell & Sherrill were constantly claiming from Fitzgerald this credit by reason of these rebates?

A. They were.

Q. Did they ever get it from him?

A. They never did.

Q. Now, Mr. Auspach, I want you to tell the jury how Munnell & Sherrill arrived at the claim of a credit of \$249 pleaded in the answer. Have you got your memorandum?

A. Yes, I think I have.

Q. State whether or not Munnell & Sherrill received a credit memorandum with reference to a disputed item of rebate of \$249 involved in this case?

A. We received credit memorandum.

Q. It got that?

A. Yes, sir.

Q. Will you produce it? That is the original that was sent to you?

A. That is the original that was sent us.

(Testimony of H. A. Auspach.)

Q. That is the original sent to you by the Mohawk Rubber Company?

A. Yes, sir.

Q. They gave you credit for how much?

A. \$111.68.

Mr. LILJEQVIST: Our answer pleads we are entitled to a credit of \$249.00. It appears from this you have given us credit for part of it.

Q. Did they give us credit for the entire \$249 which we claim?

A. They did not.

Mr. BISCHOFF: What is the date of that?

A. This is dated December 28, 1921.

Q. Now will you state what the fact is with reference to the real amount of the rebate that you should have, and show how you figure it out from the records of the company, of the goods sold to you and delivered, and with reference to the decline in price.

A. I arrive at \$249 by using the difference in the previous cost and the new declined prices on the tires.

Q. When did they send new price list showing the decline?

A. I think the new price list came on November 15th, if I recollect correctly.

Q. 1921?

A. 1921.

(Testimony of H. A. Auspach.)

Q. And this credit memorandum was sent to you after that time, was it?

A. It was sent after that time, yes, sir.

Q. And they gave you credit on the price decline of how many dollars?

A. \$111.68.

Q. Now based upon their same price decline list which they sent you, and based upon the same tires that they figured, will you tell what the real credit is that you are entitled to, and just tell how you arrive at it.

A. The difference in the old cost and the new cost on each tire.

COURT: What?

A. The difference in our old cost and the new cost on tires; using that for a basis for each tire the amount is figured.

Q. Will you take up the item wherein they give you credit and the dates the goods were purchased, and show wherein their credit agrees, or the credit you claim you were entitled to, which is different, and explain upon what basis your figures and their figures differ, if you can?

A. Well, they take our list as we sent it, and show it on this credit, size for size, and tire for tire. However, I don't know how they arrive at their amount of rebate on each size. It is not the difference in the cost, as far as we know.

(Testimony of H. A. Auspach.)

Q. Now taking the exact list that they give you credit for to only the amount of \$111, take that same list and apply to it the decline on the cost for the sixty day period, upon the very list which they send you. Now what figures do you arrive at?

Mr. BISCHOFF: That is objected to unless shown what merchandise they purchased within sixty days period of time, and how much they had on hand upon which they were entitled to rebate.

COURT: They have the list you sent. Figure on that list.

Mr. BISCHOFF: I didn't know they hadn't any list we sent; hasn't been offered in evidence.

Mr. LILJEQVIST: No, it has not. We are asking him to figure from your list the amount, and we are basing it on your list.

A. I figure it \$249.44.

COURT: How do you do it?

A. We will assume here we have five $33\frac{1}{2}$ cases. The difference in our cost is \$2.55 per casing, I see.

Q. Are these the identical casings which they show?

A. The casings which they show.

Q. How much do they give you on it?

A. \$1.25.

Q. You have lost your copy of it, have you?

A. Yes.

Q. Do you remember what the price cut was? You can just state that.

(Testimony of H. A. Auspach.)

A. Not personally. I think very little, perhaps 15 to 20 per cent. I don't remember just what it was.

Q. Just one question in reference to this matter of this list. I hand you carbon copy of this letter of November 21, and ask you to produce the original if you have it, and ask you if that is our letter sent to them in reference to this same list of stuff that we are entitled to credit on?

A. Yes, sir.

Q. That was dictated to you?

A. Yes, sir, the first part of it.

Q. Is this a carbon copy of the list of tires you had purchased from the company and on which you claim rebate should be allowed by reason of the decline in prices?

A. This is a carbon copy of the list, yes, sir.

Q. This is just list of the tires, is it?

A. That is a list of the tires, possibly tubes, too.

Q. And after subsequently sending them this list of tires of November 21st, did you get this list back?

A. We did.

Q. And figuring the list as they sent it to you at that time, copy of which you have lost, will you state whether these credits as they have given them to you, and as you claim them, differ as shown by lead pencil notation?

A. They differ in that amount.

(Testimony of H. A. Auspach.)

Q. Then there is simply a dispute between you of the difference between \$249.44, which you claim you are entitled to on that list, and the credit of \$111.68?

A. That is the difference.

Mr. LILJEQVIST: We offer the letter of Nov-21, 1921.

Marked "Defendants' Exhibit 43."

Defendants' Exhibit 43

Nov. 21, 1921.

Mohawk Rubber Co.,
San Francisco, Cal.

Gentlemen:

Herewith list of tires and tubes received since Sept. 15th which were on hand at time of decline in price Nov. 15th subject to rebate:

5—30x3½ N S Fabs.	582472	582521	605660
	588965	591032	
2—31x3½ N S Fabs.	640099	640434	
2—34x3½ " "	649282	649284	
2—33x4 " "	634235	634005	
1—37x4½ " "	640206		
2—35x4 " "	623274	607287	
5—33x4 " Cords	632252	632707	636089
	631645	632234	
5—34x4 " "	630240	620243	632618
	632627	632880	
1—33x4½ Rib "	528457		

(Testimony of H. A. Auspach.)

4—33x4½	N S	“	630008	630056	622143
			622064		
4—34x5	“	“	627428	627550	638475
			668806		
2—37x5	“	“	627891	627799	
4—28x3	Red Tubes				
4—35x4	“	“			
1—31x3½	“	“			
5—31x4	“	“			
5—33x4	“	“			
6—37x5	“	“			

Yours very truly,

Munnell & Sherrill,

AJS:A

By

Mr. LILJEQVIST: And their list of November 28, 1921, giving us credit for \$111.68.

Mr. BISCHOFF: No objection to its going in the evidence, with the understanding it is not to be regarded as a duplicate credit, which we have already allowed on our statement, and which we have shown here.

Marked “Defendants’ Exhibit 44.”

Defendants’ Exhibit 44

Credit Memo

THE MOHAWK RUBBER COMPANY OF NEW
YORK, INC.

Akron, Ohio.

Branch San Francisco

Credit Memo N. 429

Credit to—Munnell & Sherrill

Date Dec. 28, 1921

(Testimony of H. A. Auspach.)

Address—40 1st St.,

Portland, Ore.

Salesman

Terms 5 per cent Jan. 10th.

Fitzgerald T

Merchandise Credit—A|C Reduction in List:

x					
5	30x3½	Cl	NS	1.25	6.25
2	31x3½	“	“	.22	.44
x					
2	34x3½	SS	NE	.66	1.32
2	33x4	“	“		
1	37x4½	“	“		
x					
2	35x4	“	“	.95	1.90
5	33x4	“	“	6.76	33.80
5	34x4	“	“	6.67	33.35
1	33x4½	“	Rib	3.18	3.18
3	33x4½	“	NS	3.26	9.78
4	34x5	“	“	3.60	14.40
4	28x3	Red Tubes			
4	35x4	“	“	.02	.12
1	31x3½	“	“	.10	.10
5	31x4	“	“	.13	.65
5	33x4	“	“	.06	.30
6	37x5	“	“	.13	.78

106.37

Forward 5 per cent Ex. Tax Net 5.31

111.68

(Testimony of H. A. Auspach.)

Q. Did you base your calculations upon the list they sent you, but which list is now lost?

A. I did.

Q. Now Mr. Auspach, were you present at the time when Mr. Fitzgerald came up from San Francisco in September, when this transaction took place with the American Tire & Rubber Company?

A. I was.

Q. Did you see Mr. Fitzgerald at that time?

A. I did.

Q. Did you hear any part of that conversation at that time with Mr. Munnell or Mr. Sherrill?

A. Yes, I did.

Q. Where and when did the conversation occur, to the best of your recollection?

A. In our office at First and Ash Streets.

Q. Now how many times were you present when a conversation occurred between either Munnell or Sherrill, or both of them, and Mr. Fitzgerald?

A. I was in the office most of the time.

Q. Will you tell the jury in your own way, to the best of your memory and recollection, what Mr. Fitzgerald said to either Mr. Munnell or Mr. Sherrill, or both of them, and what they said to him referring to this stock that you had on hand, and this new deal that had been made with the American Tire & Rubber Company?

A. As I recall it, Mr. Fitzgerald made two trips to our office, or two calls at our office, regarding

(Testimony of H. A. Auspach.)

that change. The first one in regard to interesting the American Tire & Rubber Company in large sizes, and possibly four or five days, maybe a week later, he made a second call. Mr. Fitzgerald said he thought that he could interest Mr. Cassidy in the larger sizes of tires; that we were not moving them; that we were not moving many large truck sizes; they called them, and Mr. Sherrill says he didn't think that he could, as near as I recall—he didn't think he could interest him in the line, because he had the General line of tires—tied up with them.

Q. This conversation, as you remember, occurred first or second?

A. The first, as I recall now. And Mr. Fitzgerald says he thought he could line him up.

Q. Now anything more occur at that talk, that you remember of?

A. Well, I don't know that I remember anything—everything—that took place at the time.

Q. What took place at the next conversation?

A. At the second call at our office, later?

Q. Yes.

A. Mr. Fitzgerald seemed to think that he could place the entire line with the American Tire & Rubber Company if we were—well he thought he could place the entire line with the American Tire & Rubber Company, and—

Q. Give your recollection of what Mr. Fitz-

(Testimony of H. A. Auspach.)

gerald said, as best you can. I know it is hard to remember exact words.

A. Well, it is pretty hard to get the exact words of Mr. Fitzgerald.

COURT: You are not expected to give the exact words, but give the substance.

Q. Was there anything said at the second conversation about Cassidy taking over the Mohawk line at all?

A. Yes.

Q. And if so, what was said?

A. Yes, there was.

Q. What was it, in a general way, to the best of your recollection?

A. Mr. Fitzgerald wanted to know what we thought of giving up the Mohawk line; that he could place it with Mr. Cassidy; and Mr. Fitzgerald was talking to Mr. Sherrill, as I recall it now, in the front office, and I know he came into the inner office, that is, the larger office, and asked Mr. Munnell what he thought about it.

Q. Who came into the inner office?

A. Well they both, Mr. Sherrill and Mr. Fitzgerald.

Q. And asked Mr. Munnell what?

A. Whether he would consent to this change in distributorship if the Mohawk Company relieved the Munnell & Sherrill Company of their stock of tires.

Q. What did Mr. Munnell say?

(Testimony of H. A. Auspach.)

A. He told him he would agree to it; he would be agreeable.

Q. Do you know whether Mr. Munnell and Mr. Sherrill did anything at that second interview with reference to going over the stock they had on hand?

A. Who?

Q. Whether Mr. Fitzgerald or Mr. Sherrill did anything with reference to going over the stock you had on hand?

A. Yes they did.

Q. What did they do?

A. They went out and counted the tires.

Q. You know that?

A. That is what they started out to do.

Q. Pardon me?

A. That is what they left the office to do.

Q. What was said at the time, do you remember anything?

A. What was said?

Q. Yes.

A. They were going out to count tires to see what we had on hand to turn over.

Q. Do you know whether Fitzgerald and Sherrill did go out to count tires?

A. Yes, they did.

Q. Do you know whether Fitzgerald and Sherrill went upstairs on the second floor in that building to count tires?

A. I assume they did. I didn't see them, because I stayed in the office.

(Testimony of H. A. Auspach.)

Q. You know they did go out to count tires?

A. I do.

Q. Do you know anything about this list that has been offered in evidence as Defendants' Exhibit 40?

A. I have seen it, yes.

Q. Do you know whether Mr. Sherrill made up that list?

A. Yes, he did.

Q. I want you to tell the jury whether Fitzgerald made up that list from what he did when he went out in the room there to count tires, or did he make that up from any stock records of any kind?

A. He made this up from little slips of paper he made notation on in counting tires; brought them into the office and made the list up.

Q. He brought back a lot of notations which he had made, and then wrote this list up, did he?

A. Yes.

Q. Is any portion of that in his handwriting?

A. The ink portion.

Q. And he wrote that ink part of it there at the office?

A. He did.

Q. Now do you know anything about receiving a letter from Mr. Fitzgerald which has been offered in evidence here, directing the turning of the tires to the American Tire & Rubber Company?

A. Yes, I saw it.

(Testimony of H. A. Auspach.)

Q. Did you see it approximately at the time it came?

A. Yes, sir.

Q. Do you know whether any tires were turned over to the American Tire & Rubber Company?

A. They were.

Q. Now do you have any personal knowledge of the detail of that, how they happened to be turned over, and what happened, what occurred, if anything?

A. Subsequent to the receiving of that letter, you mean?

Q. Subsequent to the receiving of that letter, yes.

A. I made an inventory of the stock, took account of the stock, checked it myself, brought them down—the shipping clerk and I brought them downstairs. We had them there on the first floor.

Q. Brought all of the stock down on the first floor?

A. That we were going to turn over to the American Tire & Rubber Company, yes.

Q. Did the inquiry that came from Cassidy—did you get it over the phone, or did some other member of the firm get it?

A. I think I received one phone call; he called several times.

Q. The phone call that you did answer the phone on, what was the message, do you know?

(Testimony of H. A. Auspach.)

A. Wanted to know when we were going to send the tires up, the stock of tires up to his place.

Q. What did you tell him?

A. Told him we were getting them ready at the time.

Q. And when the drayman came were you present then?

A. I was there.

Q. I think you testified who the drayman was, before, and how he came. Will you tell the jury whether or not any complaint was ever received by Munnell & Sherrill from the American Tire & Rubber Company as to the amount of tires that they got, the quantity or condition or quality, or any other phase of it?

A. No complaint whatever.

Q. Did you hear from them again in reference to the matter?

A. No, not with reference to that.

Q. The first controversy over that matter was what?

A. When we received a wire from the Mohawk Rubber Company of San Francisco.

Q. That is in evidence. Were you present at any time when Cassidy was there? You were not present at the meeting I guess, that took place at Cassidy's store. Were you present at Cassidy's store when they had the conference?

A. I was not.

(Testimony of H. A. Auspach.)

Q. Did Cassidy ever tell Munnell & Sherrill that he did not accept these tires?

A. Not to my knowledge.

Q. Did he ever intimate to you in any way that he wasn't accepting the tires that you turned over to him?

A. No, sir.

Q. Well, did you figure out the cost to you of them?

A. I didn't figure out the cost. We used our cost at the time.

Q. It says, "Upon receipt of said lists and information credit for the amounts will be issued to apply against your account." Did you figure out from the list you turned over, the amount of credit you should get?

A. Yes, sir, I did.

Q. Upon what basis did you work the amount?

A. Cost of the tires at the time.

Q. Cost of the tires at the time, to whom?

A. Cost to Munnell & Sherrill.

Q. Cost of the tires at the time to Munnell & Sherrill. Then that would be based upon what?

A. The last price list or discount.

Q. Now can you tell the jury how much that list amounts to?

A. Forty-nine hundred and some odd dollars.

Q. What is that?

A. Something over \$4900.00, I think.

(Testimony of H. A. Auspach.)

Q. Now the pencil memorandum in this Exhibit 9, which has been offered in evidence—

Mr. BISCHOFF: \$4900 did you say?

A. No, \$9800.00. \$9814.00 is the amount.

Q. Upon this Defendants' Exhibit 9 which has been offered in evidence are certain pencil memorandum, upon the original typewritten copy sent to Fitzgerald, which you have heretofore referred to. In whose handwriting are those memoranda?

A. Mr. Munnell's.

Q. Is that the handwriting figuring out this price?

A. Yes.

Recess until 1:30.

Tuesday, June 19th, 1923, 1:30 P.M.

H. A. AUSPACH resumes the stand.

Direct Examination (Continued).

Questions by Mr. Liljeqvist:

Now Mr. Auspach, just before noon we were trying to determine the basis upon which you figured the price charge for a credit against the Mohawk Rubber Company for tires turned over to the American Tire & Rubber Co. Now will you state what list you used in your figures in basing the value of the tires that were turned over to the American Tire & Rubber Company?

A. Used the list of May 10, 1921.

Q. The list which has been offered in evidence?

A. Yes.

(Testimony of H. A. Auspach.)

Q. Now in reference to counsel's statement of whether that cost you more or not, the list that you used and on which you were charging them, will you state whether or not that list is a list lower in price than what you actually paid for tires?

A. It is lower.

Q. And if you had charged the Mohawk Rubber Company what the tires actually cost you according to the invoices when the goods were shipped, you would have charged them more?

A. We would.

Q. In other words, you charged them, then, at the list with a certain percentage off, which was in existence at the time these tires were turned over?

A. Yes.

Q. Is that correct?

A. That is correct.

Q. And the price you paid for the tires, what the tires actually did cost Munnell & Sherrill, what was it, higher or lower than this list price that you used?

A. The price was higher.

Q. And in the credit slip which we have offered in evidence, where they gave us credit for a little over a thousand dollars worth of tires which were turned over to Cassidy, did they use the same list price that you used?

A. They did.

(Testimony of H. A. Auspach.)

Q. Then what is the fact with reference to the list which you used being the list which is offered in evidence as Plaintiff's Exhibit 34, in determining the amount of credit which the Mohawk Rubber Company should give you upon the tires turned over to Cassidy?

A. That is the same list.

Q. That is the same list. Will you tell the jury whether this credit slip which is Defendants' Exhibit 8, where they gave you credit for \$1079.25 for tires turned over to Cassidy—whether they used the same list in figuring their credits?

A. They did.

Q. Now since the noon recess, will you state whether or not you have dug up the revised list of November 15, 1921?

A. Yes.

Q. I hand you letter of November 15, 1921, with list attached to it, and ask if that is the letter and list based upon which you figured the reduction that we should get upon this two hundred forty-nine odd dollar item which is in dispute?

A. Yes.

Letter and list offered in evidence and marked "Defendants' Exhibit 45."

Defendants' Exhibit 45

Akron, Ohio, November 15, 1921.

To the Trade:

We enclose herewith revised prices on Mohawk

(Testimony of Arthur J. Sherrill.)

"Quality" Tires, effective November 15, 1921.

You will note reductions in prices ranging from approximately 14 per cent to 34 per cent.

With tire prices far below pre-war figures and an advancing market on rubber and fabric, it is not reasonable to expect these bargain prices will continue long.

Remember the quality of Mohawk products is superior and will be kept so.

The right to limit dates of delivery at these figures is reserved by us on all orders.

Please note that we still supply odd sizes.

Claims for rebate for goods bought since September 15th and on hand unsold November 15th will be recognized only when serials, sizes and complete information is sent in.

Mohawk flat tread cords at competitive prices.
Let's go.

Yours truly,

The Mohawk Rubber Company.

PRICE LIST

Effective Nov. 15, 1921.

CORD PRICES

P. S. Gray

Sizes	Non-Skid Cord	Ribbed Cord	or Red Tubes
30x3½ C. (4 ply)	\$19.00		\$2.80
30x3½ C. (Heavy)	26.50		2.80
32x3½ D. (6 ply)	28.00	\$27.00	3.10

(Testimony of H. A. Auspach.)

31x4	D.	31.00		3.50
32x4	D.	34.10	33.25	3.70
33x4	D.	35.15	34.25	3.85
34x4	D.	36.10	35.20	4.00
32x4½	D.	44.10	43.00	4.75
33x4½	D.	45.20	44.05	4.90
34x4½	D.	46.20	45.05	5.10
35x4½	D.	47.60	46.40	5.25
36x4½	D.	48.70	47.50	5.40
33x5	D.	55.00	53.65	5.70
35x5	D. Special	59.50		6.00
37x5	D.	60.70	59.20	6.30

PNEUMATIC CORD TRUCK TIRES

		Casing	Red Tube
34x5	D.	\$ 56.50	\$ 5.90
36x6	D.	87.00	11.50
38x7	D.	121.50	15.50
40x8	D.	156.50	19.60

FABRIC PRICES

		Little P. G. Gray			
		Non-Skid	Ribbed	Chief	or Red
Size		White	White	N.S. Black	Tubes
28x3	C.	\$14.50			\$2.55
30x3	C.	15.00	\$14.25	\$12.35	2.40
30x3½	Combination				
30x3½	C.D.	17.00	16.15	14.75	2.80
31x3½	C.	19.00			3.00
32x3½	C.D.	21.50	20.45	19.15	3.10
34x3½	Q.D.	24.00			3.40

(Testimony of H. A. Auspach.)

31x4	C.	24.50	23.30	22.00	3.50
32x4	C.Q.D.	28.50	27.10	25.45	3.70
33x4	C.Q.D.	30.00	28.50	26.80	3.85
34x4	C.Q.D.	30.50	29.00	27.35	4.00
35x4	Q.D.	32.50			4.25
36x4	C.Q.D.	34.00			4.50
32x4½	Q.D.	37.85	35.95		4.75
33x4½	Q.D.	39.10			4.90
34x4½	C.Q.D.	40.30	38.30		5.10
35x4½	C.Q.D.	42.00	39.90		5.25
36x4½	C.Q.D.	43.00	40.85		5.40
37x4½	Q.D.	44.00			5.75
33x5					5.70
34x5					5.90
35x5	Q.D.	48.00	45.60		6.00
36x5	C.Q.	51.00			6.25
37x5	C.Q.D.	52.00	49.40		6.30
36x5½	C.	58.00			7.40
37x5½	Q.	62.00			7.65
38x5½	Q.	64.00			7.90

Q. Do you know what your discount was on that list?

A. I do.

Q. What was it?

A. Twenty-five and fifteen per cent.

Q. These figures on the pink list given there—figuring it out on 25 and 15 off that list price, what is the amount—what is the value of the tires which you turned over to the American Tire & Rubber

(Testimony of H. A. Auspach.)

Company?

A. Was ninety-eight hundred and fourteen dollars and some cents.

Q. \$9814 and how many cents?

A. Some odd, I don't know.

Q. Is the list price on the May 10, 1921, list with 25 and 15 per cent off, the replacement cost of these tires at the time they were turned over to the American Tire & Rubber Company?

A. It is.

Cross Examination.

Questions by Mr. Bischoff:

Mr. Auspach, referring to this credit memorandum of December 28, 1921, that was forwarded to your company as a credit to take care of the decline in price which was announced in November 1921, is that correct?

A. I think it is.

Q. And as I understand it, this was sent to you after your office had forwarded a list of tires which you had on hand, and which you claim were subject to the rebate?

A. Yes.

Q. That is, first you sent them the list and said we have so many tires that we purchased—that is the substance or effect—so many tires which we purchased within the sixty days prior to that decline?

A. That is right.

(Testimony of H. A. Auspach.)

Q. And then they took that list and sent you this credit memorandum computing the amount?

A. Yes.

Q. Is that correct?

A. That is correct.

Q. Now does this list cover all the tires upon which you claim a credit?

A. To my knowledge it does.

Q. So that there isn't any question as to the number of tires upon which you were allowed a credit?

A. I think not.

Q. The only question you make is as to the amount of the credit?

A. Yes.

Q. Is that correct? Now take for example the first item of 30x3½ tires, and they allow you a discount of \$1.25 on each one of these tires. Now how do you arrive at your conclusion that this wasn't sufficient discount? Will you just explain to the jury how you figure that?

A. I took the list of November 15th—I think that is the date of it—and figured the 25 and 15 per cent discount off, giving our cost on that tire, and deducted that amount from the original cost—the cost in the one previous to that.

Q. Where is that list you received, have you got that?

Mr. LILJEQVIST: I offer it in evidence.

(Testimony of H. A. Auspach.)

Q. This is the last list that you say you were going by?

A. Yes, sir.

Q. This Exhibit 45?

A. Yes, sir.

Q. Now what is the price of that tire as shown by that list?

A. 30x3 $\frac{1}{2}$ non-skid clincher—30x3 $\frac{1}{2}$ non-skid clincher lists at \$17 with discount of 25 and 15 per cent.

Q. This list doesn't appear to be the list by which you were to pay the Mohawk people, does it?

A. Only as a basis.

Q. This is the list price to the consumer?

A. Yes, sir.

Q. Retail list. What is the price of that tire, that you were to pay?

A. The price of it, what we were to pay for it?

Q. Yes.

A. I can figure it.

Q. Did you figure that out at any time before you came here to testify?

A. No.

Q. Well did you ever figure it out?

A. I have at times.

Q. When you got this memorandum, this credit memorandum, did you write to the company calling their attention to where the error had been made?

A. I think we wrote them about it.

(Testimony of H. A. Auspach.)

Q. You think you did?

A. Yes, sir.

Q. Are you in doubt about it, or are you sure you wrote them?

A. I am pretty sure we wrote them.

Q. Will you let us have carbon copy of the letter which you wrote them calling attention to their miscalculation of these prices?

A. I think it is in evidence.

Q. It is in evidence?

A. I say I think it is.

Q. Well let us see it.

A. The one calling attention; I can't give the exhibit number of it, I don't remember that.

Q. Do you remember what date that was?

A. Shortly after the date of that credit.

Q. Will you find the letter that you refer to among these exhibits? I think you will find they run in order.

A. I don't see the letter in that.

Q. Now when you got this credit memorandum—let me ask you first: do you know when these tires were purchased? Have you any record here to show when these particular tires were bought?

A. I think there is a record. They were bought within sixty days of the date of the decline.

Q. Have you any invoices here showing these tires, so that we can get some definite information to the jury as to what you paid for them and what

(Testimony of H. A. Auspach.)

you should be credited for them under this list?

A. The invoices are all here, I think.

Q. Lets have the invoices for these tires. That is how we are going to get accurate information.

A. Perhaps if I had that list there to guide me—I think this bunch of invoices pretty well covers it.

Q. Lets have what you paid for the first item of that. Lets get one or two items to see to what extent you are correct in the calculations.

A. 34x3½ non-skid straight side, fabric tire, the third item on this list.

Q. When was that purchased? What is the invoice number?

A. Invoice of November 9th; two of those tires charged us at \$21, 10 per cent discount.

Q. What was the net?

A. \$18.90.

Q. Is that indicated on that invoice?

A. In this invoice?

Q. Let me see that invoice. What is the net price of that tire that you are speaking of, as indicated on this invoice?

A. \$21 less 10 per cent discount, be \$18.90, plus the discount of 5 per cent.

Q. Compute that tire according to the new list. What was the new list price of that same tire?

A. The new cost on that was \$15.30.

Q. Now the list price on this November 1st for

(Testimony of H. A. Auspach.)

the same size?

A. \$24.00.

Q. Then you had 40 off that to make your net price?

A. No, not 40; 20, 5 and 15.

Q. And 5 for cash?

A. Five for cash, plus war tax.

Q. What does that amount to?

A. \$15.30 plus war tax.

Q. What is the difference between the two?

A. \$3.60.

Q. How long have you been with Munnell & Sherrill?

A. About six years.

Q. What is your position with that firm?

A. Various duties about the office at the present time. I don't keep the books now.

Q. Principal bookkeeper?

A. No, I don't keep the books now.

Q. Did you keep the books at the time Munnell & Sherrill were distributors for the Mohawk tires?

A. Yes, sir.

Q. What else was your duty about that time, besides keeping the books?

A. Did the billing, the pricing.

Q. General office man. Would that cover your occupation there?

A. Perhaps.

Q. Did the correspondence that was exchanged

(Testimony of H. A. Auspach.)

between Munnell & Sherrill and the Mohawk Company, or with Mr. Fitzgerald, pass through your hands?

A. Well most of it; that is I say perhaps most of it.

Q. When did you see these letters of October 19th and 30th, 1920? Shortly before this adjustment which resulted in the giving of the five notes, was made?

A. Possibly.

Q. Now I call your attention to this letter, to see if that letter will refresh your recollection as to whether you saw that?

A. Yes, I have seen that letter before.

Q. And the following letter of October 30th from the plaintiff to Munnell & Sherrill?

A. I think I have.

Q. Now both of these letters deal with the same subject, and that is with respect to protection of the cost decline, don't they?

A. Part of it, yes.

Q. One came from Mr. Fitzgerald at San Francisco, and the other came from Akron, and in those letters they tell you what the situation is with respect to decline in price, didn't they?

A. Yes, sir.

Q. They told you that that matter was under consideration by a number of tire—by a committee on trade relations and that they would have to be

(Testimony of H. A. Auspach.)

governed by their determination?

A. Yes.

Q. Now you knew then of course that neither the Mohawk, that is direct from their home office, nor Mr. Fitzgerald, were in position to make you an absolute agreement as to rebates for decline in prices, didn't you?

A. Well I don't know as I knew that just because there was a ruling.

Q. You knew that was the position that they took didn't you?

A. Possibly.

Q. Well now, notwithstanding this information that was communicated to you by Mr. Fitzgerald and by the home office, you want the Court to understand that notwithstanding that Mr. Fitzgerald came there shortly thereafter and gave you an absolute agreement that he would protect the firm against—give them an unlimited protection against decline in prices?

A. State your question again.

Q. I say, notwithstanding this information had been communicated to you or your firm at the end of October, you want the Court and jury to understand that Fitzgerald nevertheless came here the latter part of November and made an absolute agreement to give your concern unlimited protection against decline of prices?

A. Well we tried—you mean in 1920 or 1921?

(Testimony of H. A. Auspach.)

Q. 1921. It is 1920 we are talking about.

A. On the stock we retained.

Q. Said he would give you absolute protection?

A. Yes, sir.

Q. Didn't he tell you something about that having to be contingent upon any rulings that the federal committee had to make?

A. I don't remember.

Q. He didn't tell you anything about that?

A. I don't remember.

Q. Did anybody ask Mr. Fitzgerald how he was in position to give you that agreement, in view of the uncertainty as to whether they would be permitted to do it?

A. I don't recall.

Q. Did anybody ask Mr. Fitzgerald to put that in writing or to confirm that in some way, so there would be a record of the transaction in that respect?

A. I couldn't say, I know I didn't ask him.

Q. You don't recall any such request being made by anybody?

A. No, sir.

Q. Now your recollection of it was that he told them that they would be protected against decline in prices on Spring dating orders which the firm would take from their customers?

A. The stock would be protected against decline for Spring dating.

(Testimony of H. A. Auspach.)

Q. Talk louder please.

A. We would have protection on that stock on the Spring dating plan, yes.

Q. Spring dating plan. That is, on all orders that Munnell & Sherrill would take from their customers, they would be protected—that is, on all Spring dating that they took from their customers, they would be protected on decline in price?

A. I don't know that that was particularly mentioned at all.

Q. Was that the substance of the conversation or agreement?

A. The agreement was we were to have protection on that stock and go out after the Spring dating business.

Q. That is to say, if they sold stock under the Spring dating plan, they would receive a credit if the prices declined?

A. Possibly.

Q. Is that so, or not?

A. They were to receive credit on the stock retained and sold.

Q. What was the Spring dating proposition? There couldn't be any Spring dating proposition involved if it wasn't that you were to go out and sell something and give terms for the payment in the Spring. Isn't that what Spring dating means?

A. That is what Spring dating means, yes.

Q. If the intention was just to give credit on

(Testimony of H. A. Auspach.)

the stock on hand, would be no talk about Spring dating, would there, it would be just a matter of giving credit for the stock on hand?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. So when they spoke about Spring dating they meant on such stocks as would be sold on Spring dating to Munnell & Sherrill's customers. Is that right?

A. I don't know whether that would cover it.

Q. I beg your pardon?

A. I don't know whether that would cover it.

Q. For what reason doesn't it cover?

A. There was some stock, perhaps, that wouldn't be sold at the time. There was nothing said about any particular part of it being subject to rebate.

Q. What did they speak about Spring dating for at all, if it didn't apply to that?

A. Well the Spring dating was protection they would have on that stock, on which they would go out after business—protect the dealer.

Q. Did Mr. Fitzgerald say anything at that time as to whether he was in a position to make such agreement, or if he would have to take the matter up with his firm?

A. I don't know, I don't think there was anything come up about it at all.

(Testimony of H. A. Auspach.)

Q. Is it you don't remember, or are you stating that as a fact that no such thing came up at that time?

A. I am not stating as a fact. I don't remember it.

Q. In other words there may have been some such talk that you don't recall?

A. Might have been.

Q. Were you ever present at any conversation with Fitzgerald, when requests were being made of Mr. Fitzgerald for certain concessions or arrangements with respect to return of merchandise or credits, and he told Munnell & Sherrill that he would have to submit it to the house?

A. I don't know.

Q. You don't recall any such conversation?

A. No.

Q. Of course you don't want to say that they didn't take place? All you want the jury to understand is you don't remember of it?

A. I don't remember any such conversation.

Q. Now you say this matter of credit for this Spring dating, or this stock that you had on hand, came up again in the conversation in June, 1921?

A. I think it did.

Q. And you say you were present at that conversation?

A. I was present at the time.

Q. Now who was it that first suggested the

(Testimony of H. A. Auspach.)

matter of compromise?

A. Suggested the matter of compromise?

Q. Yes.

A. Well Mr. Fitzgerald seemed to think we were asking an awful lot, and he suggested the matter of one note.

Q. Well he complained at that time that you were asking for rebate on the entire stock that you had on hand, didn't he?

A. I think he did.

Q. You know he did. Isn't that right?

A. Yes.

Q. Now under this announcement that the company made, you knew that you were only entitled to rebate on the merchandise purchased within sixty days prior to May 2nd—that is, during March and April—didn't you?

A. In that form letter they sent out—in fact I disregarded as Mr. Fitzgerald had made arrangements previously to have this entire stock on Spring dating terms.

Q. In that list that you spoke of, in June 1921, there was a large quantity—the greater part of it in fact was stock you had had on hand a good deal longer than prior to March of 1921?

A. I think is some on the list that was on hand prior to March 1921.

Q. A large portion of it had been purchased prior to the December 1920 settlement?

(Testimony of H. A. Auspach.)

A. Some of it had, yes.

Q. And another large portion of it had been purchased between December 2nd, when this settlement was made, and May 10th, when this decline was announced?

A. Part of it was.

Q. So that you understood, didn't you, that you could claim no credit for any merchandise that you had purchased, for instance, between December 2, 1920, and March 1, 1921?

A. That was the understanding, I believe.

Q. I beg your pardon?

A. I believe that was understood. The merchandise undoubtedly was sold after.

Q. You understood you couldn't get any credit for that merchandise under that arrangement?

A. I don't know.

Q. Is that correct, or isn't it?

A. I don't know.

Q. Mr. Auspach, may I ask you to speak up a little bit louder so the reporter can get your answer, and so we can hear it. Lets see if we can get this thing straight. Your contention was that you, under the arrangement made in December—that you were entitled to rebate on all the stock on hand at that time?

A. Yes.

Q. And that you would be entitled to rebate on the purchases made during March and April of

(Testimony of H. A. Auspach.)

1921?

A. Yes.

Q. But nothing in that arrangement contemplated any rebate for the merchandise purchased between December 2, 1920, and the beginning of March 1921, did it?

Mr. LILJEQVIST: I think that is immaterial. We are making no claim for anything there. We are simply claiming we are entitled to rebate by having one note discharged, and for \$9814 discharged later on by turning this stock over to Cassidy. What difference does it make whether we bought a hundred dollars worth or a thousand dollars worth between December 1, 1920, and March 1, 1921? We are not making any claim. That part is not in issue at all.

Mr. BISCHOFF: The question of how much stock they had on hand upon which they were entitled to rebate, would certainly be material.

COURT: I think so.

Q. (Question read.)

A. I don't know.

Q. You don't know.

A. No.

Q. Do you know anything more about it now that you have looked at this paper?

A. All that merchandise had been paid for.

Q. Now the fact of the matter is that you didn't know at the time of this conversation, with-

(Testimony of H. A. Auspach.)

out making a study of the entire business done, how much of that merchandise which you put into that list had been purchased within the sixty days prior to May 2d, did you?

A. Had been purchased?

Q. Between December 2 and March 1, 1921, and how much had been purchased long before December 2, 1920, did you?

A. I can't say that I did, exactly.

Q. All that you know is that you had taken a list of everything that you had in stock, and asked for a rebate on it?

A. I think that is what we did.

Q. And that is what Mr. Fitzgerald was kicking about at that interview?

A. Possibly he was.

Q. Now you say possibly. Don't you know whether he did or not? If he didn't, say so. If he did, let's have the fact. Is that right?

A. He kicked about it.

Q. Now didn't he tell you then that whenever you prepared a list of stock which would bring you within the terms of the decline announced, that they would be ready to extend you credit?

A. I don't recall him telling us that.

Q. He may have said that and you don't remember?

A. He may have said it.

Q. That is the best answer you can make to

(Testimony of H. A. Auspach.)

that?

A. Yes, sir.

Q. Now isn't it a fact that it was Mr. Munnell that suggested the cancellation of one note?

A. I think not.

Q. I beg your pardon?

A. I say I think not.

Q. You are sure about that?

A. I won't be sure about it.

Q. Might have been and you don't remember?

A. Yes, as I recall it, it was Mr. Fitzgerald.

Q. Do you recall Mr. Fitzgerald saying anything about it being out of his jurisdiction to consent to the cancellation of any notes, and that he would have to refer that to the factory?

A. No, sir.

Q. You don't remember of his saying that?

A. No, sir.

Q. Now referring to this list of tires that Mr. Fitzgerald wrote on these yellow sheets, Exhibit 40. As I understand it you didn't go with Mr. Fitzgerald and Mr. Sherrill through the stock room to see what was there?

A. No, I did not.

Q. So when you testified that Mr. Fitzgerald took the stock, that is purely your assumption?

A. It was my assumption because that is what they started out to do.

Q. They went out to look over the stock and

(Testimony of H. A. Auspach.)

you assumed that they were going to take stock and make a list of it?

A. Yes, sir; made a list after they came back in there.

Q. But whether they actually did that, you don't know of your own knowledge?

A. No, I do not.

Q. All that you say was that Mr. Fitzgerald and Mr. Sherrill left the office?

A. Yes, sir.

Q. And the next thing you saw, they came back?

A. Yes, sir.

Q. And Mr. Fitzgerald sat down somewhere in the office and wrote these papers?

A. Yes, sir.

Q. Now I call your attention to the figures that are in lead pencil. Are those your figures?

A. I don't know. Let me see them. No, they are not.

Q. Do you know who wrote those figures on there?

A. Mr. Munnell's writing.

Q. Do you know whether the figures that appear opposite each item—whether those represent the net list prices or the gross list prices at which they are sold to the retail trade?

A. I think they represent the cost of tires to Munnell & Sherrill.

(Testimony of H. A. Auspach.)

Q. Represent the cost of the tires to Munnell & Sherrill?

A. I think so.

Q. Are you sure about that?

A. Reasonably sure. I think that is what they are; the current price on them at the time.

Q. Is this the price at which they were billed out to Cassidy, or to the Mohawk people, after a part of them had been delivered to Cassidy?

A. I think it is.

Q. Did you make up the bills from which the price was computed, or the invoices?

A. I make the list of tires, yes.

Q. We have sent to Munnell & Sherrill?

A. Invoice showing so many tires at so much.

Q. To the Mohawk Company?

A. No, sir, only a memorandum of the tires turned over.

Q. All you did was to send them a list of tires with serial numbers?

A. Yes, sir.

Q. That was all the information you sent them, is that right?

A. Possibly that is all the information; that is all I know of.

Q. You know that is all the information, don't you, from the list you made up?

A. That is all I sent them, yes.

Q. Why do you keep saying possibly, when you

(Testimony of H. A. Auspach.)

know it to be a fact?

A. Someone else may.

Q. Are you afraid you will say something?

A. No.

Q. Now why didn't you make up a list showing description of the tire and the amount that you were charging the Mohawk Rubber Company with for that tire?

A. Well it had never been customary in our office; we always sent them list, and they sent us a credit memorandum after figuring it out.

Q. When Mr. Fitzgerald was making this list did you assist him any in giving him any information?

A. No, sir.

Q. Were you present at any interview with Mr. Cassidy?

A. No, sir.

Q. Did I understand you to say that you had had a conversation with Mr. Cassidy over the phone, regarding some tires?

A. I don't know whether Mr. Cassidy or not; from his office. I answered the phone, and they wanted to know when the tires were going to be sent up, the stock of tires.

Q. All that you know of it, is that somebody from Cassidy's place of business called up on the telephone?

A. Yes, sir.

(Testimony of H. A. Auspach.)

Q. You don't know whether it was Cassidy or someone else?

A. No, sir.

Q. And all that you were asked is when were you going to send the tires?

A. When were we going to send the stock.

Q. When were you going to send the stock. Is that all that was said?

A. As far as I remember.

Q. Nothing was said as to size?

A. No, sir.

Q. Or kind, or anything else?

A. No, sir.

Q. Did you know what stock was referred to when they called you up and said, "When are you going to send the stock?"

A. I did.

Q. You knew it was to come out of the stock you had in your place?

A. Yes, sir.

Q. But you didn't know what part of it, or what particular sizes or styles, did you?

A. There were none mentioned; no particular size or style mentioned.

Q. Now did I understand you to say that you were the one who made—that segregated the quantity that was to be sent to Cassidy?

A. I pulled them off the shelves and counted them, yes.

(Testimony of H. A. Auspach.)

Q. You went up to the stock room with the shipping clerk, I believe you said?

A. Yes, sir.

Q. And you selected a certain amount of tires?

A. Yes, sir.

Q. Had anybody told you what particular tires you were to pull out?

A. Well I don't recall just now whether they did or not.

Q. All you did was to go there at random and pick out tires such as you thought you wanted to send?

A. I think we had some understanding in the office there.

Q. Did anybody tell you what that understanding was?

A. I don't remember.

Q. Will you tell us just how you arranged it, or how you made up your mind just what tires you were to take out of your own stock and sent to Cassidy?

A. We were to keep a tire or two of every size; keep a representative stock and send the rest.

Q. In other words, you were to pull out a stock of tires according to your own judgment, or the judgment of the shipping clerk who was with you?

A. Well no, we were to keep a certain number of tires, that is, we had arranged—prearranged—to keep a representative stock, and all the rest of

(Testimony of H. A. Auspach.)

the tires were to be pulled out.

Q. How did you come to—how did you arrange to take out just the particular number of tires that you did? Why didn't you pick out 400 instead of 300 or 350? Who had given you instructions, or what let you to pick out just that particular amount?

A. The fact that we kept a tire or two of every size, and all the rest of them were to go out, possible in the amount—well it figures the amount of \$9814.

Q. You picked out a bunch at random, and then they figured \$9814 according to your figures, and that is what you made up your mind you were going to send?

A. It might have been prearranged that would be the tires.

Q. What?

A. It possibly was prearranged we would send that many tires.

Q. Possibly prearranged. Do you know whether it was or not?

A. It must have been.

Q. When you got them down with the shipping clerk, what was the next thing that was done with respect to that group of tires?

A. They were counted again.

Q. I beg your pardon?

A. They were counted again.

(Testimony of H. A. Auspach.)

Q. Did you telephone to Cassidy and say we have got them ready for you, or do anything of that sort?

A. I don't remember whether I did, or someone else did, just now.

Q. You know this transfer company that took these tires away?

A. I don't know them personally.

Q. I mean do you know the firm?

A. I think that was the first time I ever heard of them. It was the Pihl Transfer Company.

Q. Did they ever do any transfer work for your firm?

A. No, sir.

Q. You don't know of your own knowledge who placed the order for them to come there and take these tires, do you?

A. I don't, sir.

Q. Now have you any records here from which you can give us the quantity of purchases made during the several months during which you did business?

A. I think most of the invoices are here.

Q. Have you any records here or in your place of business from which the monthly purchases can be readily taken off?

A. I think the ledger sheets are here.

Q. I show you a card which is a record of purchases made by Munnell & Sherrill, kept by the

(Testimony of H. A. Auspach.)

plaintiff, which purports to give the purchases by months, and will ask you to look that over and see if you can state whether that is substantially a correct report of the course of dealing?

A. From memory I couldn't say, but the totals seem to be right.

Q. You say the totals seem to be fairly accurate?

A. I don't suppose they are so very far wrong.

Q. That is, the totals for each month appear to be—

A. Each month—I couldn't tell from memory just whether it is right or not.

Q. Have you any record corresponding to a record of this kind?

A. We have a record. Mr. Liljeqvist has it there.

Q. Will you please get it and see if you can give us these purchases. Will you please give us the amount of your purchases for the different months beginning with—

A. March, 1919.

Q. March, 1919.

A. \$4297.98.

Q. April?

A. \$5345.33.

Q. May?

A. \$3075.09.

Mr. LILJEQVIST: Give the years?

(Testimony of H. A. Auspach.)

A. 1919.

Q. Now just read them on down the line.

A. June 1919, \$1366.97; July \$3015.31; an item in April of \$14.60 I don't just recall what that is. August \$2424.78. September \$8809.03. An additional charge here in July of \$550.52.

Q. Just go on and read the rest of it.

A. October \$7211.67. November \$1298.03. December—very little in December—an item of \$16.97 and \$17.13, and \$13.94.

Q. That is December 1919?

A. Yes.

Q. Isn't there a purchase of \$25,000 worth in December?

A. Well that is carried over until the following year, I think, on account of the Spring datings.

Q. All right, give the next.

A. Spring dating, that amounted to—one item of \$27,208.60, \$1807.85, \$1458.73, \$532.67. Those items cover the December, January and February invoices.

Q. Those are the Spring dating orders placed in the Fall of 1919, for payment in the Spring of 1920?

A. '20, yes.

Q. Now go on and give us—

A. March 1920, \$2166.52. Another invoice of the same month \$190.44. April \$1233.10. May \$241.80—that was a March invoice—May \$2492.75. June \$2665.30. July \$673.52. August \$980.60. Sep-

(Testimony of H. A. Auspach.)

tember \$2671.83, and \$709.17. October \$397.08, and \$236.79. November \$2238.—no, that is October \$2238.06. November \$174.20.

Q. Those are all for 1920?

A. Yes.

Q. Have you any record of any Spring dating orders for the year 1920? That is, orders placed in the Fall of 1920, for payment in the Spring of 1921?

A. I have no record.

Q. Give us the 1921 purchases.

A. February \$15.05, \$114.93; that is February too. March \$577.13. April \$929.40. May \$1247.90. June \$854.84. July \$1075.62, and \$1523.25. August \$2382.85. September purchases \$1145.42. October \$573.93 and \$136.26. November \$9734 and \$19.84.

Q. Are those ledger sheets that you have there?

A. Yes, sir.

Q. Will you point out the entries you made on those ledger sheets after the notes of December 2nd were given?

A. After the notes of December 2nd?

Q. Yes, 1920. Don't they show the charge against the Mohawk Rubber Company of thirteen thousand dollars and more?

A. There is no other entry made.

Q. What entries were made with respect to the settlement that was made at that time?

A. The only entries were the tires returned, credit for the tires returned.

(Testimony of H. A. Auspach.)

Q. Didn't they enter the notes in here?

A. They were not entered.

Q. Where is the entry of the stock returned?

A. This—that was referring to this amount here.

Redirect Examination.

Questions by Mr. Liljeqvist:

These two sheets which you have been interrogated about, are the original ledger entries of Munnell & Sherrill?

A. Yes.

Q. And in your handwriting?

A. Most of it. Part of it in some other man's handwriting.

Q. Do you know who the other man was?

A. Yes.

Q. Who was it?

A. Mr. Everett Jones.

Q. Where is he now?

A. He is in Enterprise, Oregon.

Q. These are the original ledger books of entry of Munnell & Sherrill, are they?

A. Yes.

Q. And all that is in here not in his handwriting, are in yours?

A. Yes, sir.

Q. When was he with the company?

A. June, 1921, I think, June or July.

Q. About one month?

(Testimony of H. A. Auspach.)

A. Yes.

Q. And outside of the time when he was there, the rest are in yours?

A. Yes.

Q. And those are the entries upon which you set forth the state of your account the way you figure it out from your business with Mohawk Rubber Company?

A. Yes.

Q. And you entered, did you, in this ledger sheet, these charges which you are making in this case?

A. I don't understand.

Q. The charges that we are making against them; that is, for the amount of that turnover to the American Tire & Rubber Company; did you ledger that account in here?

A. Yes, sir.

Q. Mr. Auspach, now in answer to a question of Mr. Bischoff as to entering up the amount of the tires that were returned to Cassidy, you said you entered up as the cost to Munnell & Sherrill. What do you mean by that? The cost at what time? The original costs? The replacement costs, or some other costs?

A. The replacement costs at the time they were turned over to the American Tire & Rubber Company.

Q. That is what you referred to?

(Testimony of H. A. Auspach.)

A. Yes.

A. And I think you have testified upon which they gave you credit for only a portion?

A. Yes, sir.

Recross Examination.

Questions by Mr. Bischoff:

You say you charged them according to the replacement cost as they were at the time you turned them over?

A. Yes, sir.

Q. Didn't I understand you to say you figured those on the basis of the price list of May 10th?

A. Yes, sir.

Q. Well hadn't there been a reduction in price on November 15th?

A. Yes, sir.

Mr. LILJEQVIST: Had we turned them over—

Mr. BISCHOFF: Please let him testify.

A. Yes, November 15th.

Q. You didn't take that reduction into account, did you?

A. We turned them over the 21st of September.

Q. You were billing—when did you make that charge against them?

A. The list was sent on the 21st day of September; the tires were turned over.

Q. But you are asking to have credit as of November 15th reduction, aren't you?

A. For the tires on hand at the time of the

(Testimony of H. A. Auspach.)

reduction.

Q. Now this morning when you testified about the price. You didn't have any figures; you hadn't computed the amount of the cost, or the replacement cost of these tires, had you?

A. It had been, yes.

Q. I beg pardon?

A. Yes, it had been computed.

Q. Didn't you testify this morning that you didn't know what the computation was? That you hadn't made a computation at that time?

A. Well I misunderstood you, perhaps. We had made the computation on a sheet that was here in the court room, the value of the tires. That is, our replacement cost on those tires turned over.

Q. Well, had you made that computation since you testified this morning, or had that been made before you testified this morning?

A. That had been made before.

Witness excused.

Mr. LILJEQVIST: I would like to have leave to amend our complaint by interlineation. There are one or two technical errors. I filed a motion to amend by changing several words here.

Mr. BISCHOFF: I make no objection.

EDGAR J. MUNNELL, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(Testimony of Edgar J. Munnell.)

Questions by Mr. Liljeqvist:

You are one of the defendants in this case, are you?

A. Yes.

Q. And acquainted with Mr. Fitzgerald?

A. Yes.

Q. Will you state whether or not your firm was buying tires from the Mohawk Company some time prior to the writing of this letter which got to the Akron office in the beginning of 1919?

A. I don't know what letter you refer to. It was early in 1919 when we started to buy.

Q. This letter which they have offered in evidence referring to territory that you might have, etc. Do you remember that letter?

A. Yes, sir.

Q. It is dated June 18, 1919. The commencement of your relations with that company commenced at that time, or had you had business relations before that?

A. No, considerably before.

Q. Had been buying tires and selling them before that?

A. Yes, sir.

Q. This is to get upon another basis, more permanent basis, was it?

A. Make it a little more definite, I think.

Q. Now Mr. Munnell, as a result of the tire business—I want to go over the details of some of

(Testimony of Edgar J. Munnell.)

it, and the dealings you had with the Mohawk Company. Will you state whether or not you had any understanding with Mr. Fitzgerald with reference to returning tires, prior to the time you made these notes in 1920, and if so, state what the conversation was.

A. Well I know there was more or less correspondence through the year 1920 up until the time Mr. Fitzgerald came up here, and a good deal of that was on our overstock of tires.

Q. Anyway you had various talks, did you, or didn't you, with he was up here, with reference to this proposition as to your returning tires?

A. Well I don't recall any special just now, I could by looking at the correspondence, but I don't know now just what certain dates that we had any talks.

Q. I mean outside of the dates. Did you at any time, in your recollection, you personally, as distinguished from the conversations with Mr. Sherhill have any talks with Mr. Fitzgerald about returning stocks to Portland?

A. To San Francisco?

Q. San Francisco.

A. Well we had various conversations with him regarding our overstock of tires and the return of a portion of it to San Francisco or some other branch.

Q. Now when he came up here in December

(Testimony of Edgar J. Munnell.)

1920, when these notes were made, will you state just what occurred at that time, what your conversation was with Mr. Fitzgerald, and his with you?

A. At the time he came up, and before we returned any tires to San Francisco, we had about \$35,000 worth of Mohawk tires and tubes on hand, which was too many tires, and we wanted the factory to take a portion of them back to San Francisco or to some other branch, and we corresponded back and forth with both the branch and with the factory. They advised us not to send any tires. It might be we sent a few tires back to San Francisco, but before sending any more they asked us not to until Mr. Fitzgerald could come up here. That is as I remember it, and at that time I think he agreed to take a certain amount of tires back.

Q. Did you send him the tires back, a certain amount, that is?

A. We sent a certain amount of tires back in November.

Q. And then you kept a certain amount, did you?

A. Well I don't know just how many we did have after we made the shipment but in our inventory of December 31, 1920, we had something between \$26,000 and \$27,000 worth of tires on hand at that time, and they were Mohawk tires and tubes.

(Testimony of Edgar J. Munnell.)

Q. That was after the shipment?

A. That was after this note settlement that is in controversy.

Q. About \$27,000 worth?

A. Something like \$27,000 worth.

Mr. BISCHOFF: In December 1919?

A. No, sir.

Mr. BISCHOFF: 1920, I beg your pardon.

A. December 31, 1920.

Mr. BISCHOFF: \$27,000?

A. Yes, sir.

Q. You said you had on hand. Will you state approximately how much of that stock came back to you, which you were unable to turn over in these two orders that have been referred to, the \$10,000 one to the tire company in Portland, and the other \$10,000 worth to Miles & Clark of The Dalles?

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial; nothing whatever to do with any issue raised in the pleadings.

Mr. LILJEQVIST: I have a further point I want to present to the Court in reference to this. They are disputing that they had any agreement with us to cover our rebate on these tires we kept in December when we gave the notes. They are denying it, we affirm it. That is a question for the jury to decide. Now it seems to me that if the fact should have been that we bought a lot of tires from them upon a guarantee of quality and a guar-

(Testimony of Edgar J. Munnell.)

antee of price, and the guaranty of what these tires would do—we invested nearly \$30,000 in these tires, and they didn't conform, we would have had, beyond any question, a cause of action, in my judgment, in reference to the quality of the goods sold, in such a state of facts.

Mr. BISCHOFF: Why didn't you—

Mr. LILJEQVIST: Hold on. That being true when they came up here—certainly if there was a lot of trouble with the tires in reference to quality, etc., if we were unable to sell \$20,000 worth of that stock we would have sold if the tires had been right, it is certainly competent evidence upon the proposition if this company were under a moral obligation, let alone a legal obligation at the time we made this agreement with them to give them the notes, and they should give us the benefit of the price decline. In other words the situation between the parties, they are attempting to claim they had no authority to make such an agreement, and didn't make such an agreement. Here we had the stock, a lot of tires which, if they hadn't come through according to their guaranty of quality etc., we would have the situation in which we would have a legal remedy if we couldn't settle, and we did settle on a proposition to give the notes, and they agreed with us that we would get the price later on, and get it and sell stuff if we were able to sell it, and on such stock as we should keep, we

(Testimony of Edgar J. Munnell.)

should have the benefit of the price decline later on. It seems to me simply one of the elements of fact. I don't see why we should plead it. I don't expect to go into calling witnesses, since the ruling of the Court, but it seems to me, now they are disputing any agreement of that kind, the situation of the parties at that time—we would certainly have the right to go into a situation of that kind if they make that attempt, and we had proven they had notice of it. In other words, it is all corroborative evidence. I don't want to take much time. I suggest that we can show that with much less trouble, and very briefly show our contention. I want to go into it and just show our contention.

COURT: Do you claim you had any such conversation with Mr. Fitzgerald?

Mr. LILJEQVIST: Our correspondence all shows.

COURT: At the time you claim the contract was made?

Mr. LILJEQVIST: We claim we made that contract. We didn't threaten to sue them.

COURT: As a part of the conversation with Fitzgerald, the quality of the tires was discussed?

Mr. LILJEQVIST: Whether it was discussed at that conversation or not, it was discussed. Letters had been written about it. One of the circumstances existing at the time of the settlement.

COURT: As I understand the pleadings, there

(Testimony of Edgar J. Munnell.)

is simply three questions shown to be in dispute. A difference of \$137.32 rebate on the tires in November 1921. You claim you are entitled to \$249 and the plaintiff gave you credit for \$111.68. That question is in dispute. The next question is the alleged agreement in June 1921, by which the plaintiff agreed to settle a controversy or dispute you were having about the decline in prices, by cancelling one of the notes. And a third is the credit which you are entitled to, if any, for tires turned over to the American Tire & Rubber Company. These are the three issues in the case, and I think the evidence should be directed to that.

Mr. BISCHOFF: I want to state in the record that I again assign as misconduct the lengthy statement of counsel with respect to defects in tires, made for the purpose of creating a prejudicial atmosphere. The matter has been ruled on on two or three occasions before. Counsel know the ruling of the Court, and his remarks I regard as having been made for that special purpose.

COURT: Let him state what was said about that.

Q. All right, state what was said by Mr. Fitzgerald and by yourself, if anything, at that time, with reference to that matter.

A. On this visit of Mr. Fitzgerald in November 1920, he came up here to try to settlement this matter of our overstock in tires, and taking care of the

(Testimony of Edgar J. Munnell.)

account. We had more tires than we knew what to do with, and wanted them to take them back. They evidently didn't want to take them at San Francisco, and didn't have any other place to take them, so they sent Mr. Fitzgerald up here, and we talked it over and he agreed to take a certain number of the tires on hand, at San Francisco. We were to give notes for what we owed him, after this credit memorandum was issued; we were to have protection on the stock we kept, regardless of when it was purchased. We were to go—we were still to go out after Spring dating orders, and consider this just as though it had been purchased for Spring dating orders. In other words, on whatever terms they could go after Spring dating orders, we could go after them with this stock. That meant, in case of decline, if the government ruling permitted a guaranty against decline, we were to get it.

Q. Based upon that talk with Mr. Fitzgerald at that time, then, state what you did, how the transaction was gone about? Did you execute these notes then?

A. The notes were executed either while Mr. Fitzgerald was here, or after he returned to San Francisco. I don't recall.

Q. And did you ship some stock to San Francisco?

A. We shipped some stock to San Francisco.

Q. And retained the balance?

('Testimony of Edgar J. Munnell.)

A. We retained the balance.

Q. And retained it upon the terms which you have stated here, did you?

A. Absolutely, yes.

Q. Now, on May 10, 1920, will you tell the jury whether or not, as shown by the correspondence here and letters sent out, whether that revised list was sent out?

A. Tires declined in May 1921.

Q. When did Mr. Fitzgerald come up to Portland thereafter?

A. Sometime after the 10th of May.

Q. There is a letter which shows he wrote you about the 18th of June, stating that he was going to come up pretty soon.

A. I think it was about the middle of June. After the middle of June some time, or about the middle of June, he arrived.

Q. Did you have a conversation with him at that time when he came up?

A. We did.

Q. Tell the jury what that conversation was?

A. Well previous to his visit we had sent him a list of the tires and the serial numbers of the tires that we had on hand at the time of this reduction in May, and I think that list included the tires that we had sold to dealers on Spring dating orders.

Q. Just go ahead and tell it in your own way.

A. If I remember rightly, he wrote us and said

(Testimony of Edgar J. Munnell.)

that the list looked like our entire stock, and whether it was—whether there was much correspondence, or not, about that time he decided to come to Portland, and it was in June when he came to Portland and this matter of the note came up.

Q. What did he say to you if anything with reference to giving you any credit?

A. Well he said that the list we had sent down to them was a little bit stiff, and it looked like everything we had on hand. If I remember rightly, he said it looked as though it was all the tires we had on hand when he was here in November. I said it isn't, it is the tires we had on hand on May 14, 1921, and the tires that we sold to dealers upon which we had to give protection. Well he says it looks pretty stiff. I says yes, but we want to be fair in the matter. What have you to suggest? Well he says, I haven't figured this exactly, but it would look to me as though this rebate on this list that you sent us amounted to over \$4000. I said I think possibly it would, between \$4000 and \$5000. He says, "Suppose I give you credit for one of these notes to apply on that, to take care of this rebate. Would that be satisfactory?" Well I said I think it would. I said it would be with me; I says, "Of course Mr. Sherrill has got to be considered in this, but I will take it up with him." Now whether Mr. Sherrill was in the office at that time or had come in, I can't say.

(Testimony of Edgar J. Munnell.)

It wasn't—it was a very short time afterwards, either the same day or the next day, that we agreed on this, the amount of one of those notes taking credit on that rebate. Understand, that at no time when Mr. Fitzgerald was here in June did he go over our stock and take an inventory of it to see how many of these tires we were entitled to rebate on, or not.

Q. He said he thought you were claiming rebate not only on part of it, but the entire list?

A. Yes.

Q. Did he adjust the matter then in that way?

A. Absolutely that way.

Q. Now did Mr. Fitzgerald ever return you that note?

A. He did not.

Q. Give you credit on the note?

A. He did not.

Q. Later on did you have another talk? Did he come up again?

A. He did.

Q. Did you have any conversation with him later on?

A. We did.

Q. What conversation was it you had with him with reference to this note?

A. Well I don't recall just exactly. As I remember it, we asked him when credit memorandum was going to come through for the amount of the

(Testimony of Edgar J. Munnell.)

note, or the return of the note?

Mr. BISCHOFF: When was that conversation?

A. I can't tell you exactly. It was on his next visit. I don't know whether that was in—I don't think it was—must have been in July or August. I am not certain just when he came up. Might not have been until September. It was afterwards—I don't know.

Q. Well what was the conversation? I will get the date and fix it here. What was said to Mr. Fitzgerald at that time, with reference to what he would do, or what should be done, if anything?

A. He told us to hold out one of the notes and not pay it.

Q. Where did he tell you that? Where was he when he told you that?

A. I am not certain whether he told us that in the office, or down at the store, but I think it was right in our main office.

Q. You had two places of business at the time?

A. Well we were interested in that tire store up above, but I don't think it was up there; I think it was in our main office.

Q. That was the third time you took up that matter and this is what he told you to do that last time?

A. Yes, sir.

Q. And that note has never been surrendered to you or cancelled by them. Tell the jury whether

(Testimony of Edgar J. Munnell.)

or not under this understanding and this agreement you had, you are claiming satisfaction and discharge of that note in settlement of this rebate matter of May 10, 1921?

A. We are claiming it.

Q. Now Mr. Munnell will you tell the jury whether or not you had any conversation with Mr. Fitzgerald later on in reference to transferring of the account to the American Tire & Rubber Company?

A. I did.

Q. Tell the jury what the conversation was, as far as you know it, by your own knowledge.

A. As I recall it, it was early in September; Mr. Fitzgerald was there and talking with Mr. Sherrill in the front office, and Mr. Auspach and I were working in the back office, probably ten or fifteen feet away. They had been talking for some time, I am not sure how long, might have been half an hour, might have been longer. They came out in the office or else I went to the door, and they called me, and Mr. Fitzgerald said: "What kind of a—how would it seem to you if I would make a deal with the American Tire & Rubber Company to take care of this territory? Mr. Sherrill says if I take the stock off your hands at what it cost you, that would be satisfactory—would that be satisfactory to you?" I said yes. I think if I remember rightly I made it a little stronger than that, but I said yes.

(Testimony of Edgar J. Munnell.)

The next thing was Mr. Fitzgerald said that he thought that would be fair, and thought it could be arranged, and I don't know whether I or Mr. Sherrill said that we would help him. I think it must have been Mr. Sherrill, because he knew Mr. Cassidy much better than I did. I think Mr. Sherrill stated, "If we can help you we will do it, but I don't think there is any chance."

Q. All right, what next occurred after that?

A. Well I don't think there was anything happened after that, as far as I am concerned, regarding the deal with Cassidy. If I remember, either I left town or Mr. Fitzgerald left town right—either that day or the next day. I know on the 13th of September I went to Seattle, and was in Seattle when I had a long distance call from the office saying that Mr. Fitzgerald had come back to town, and they were ready to make the deal.

Q. Who was the call from, do you remember?

A. The call was from Mr. Sherrill.

Q. What the conversation was with Mr. Sherrill at that time when he came back, of course you don't know of your own knowledge.

A. I don't know. I don't know what conversation he had after that. I know it was several days from the time the settlement was broached first to me, until I knew anything more about it, whether it had been consummated or not. I should say probably—

(Testimony of Edgar J. Munnell.)

Q. Were you there when these tires were delivered over to the American Tire & Rubber Company?

A. I was in Portland, yes.

Q. Were you in Portland when this matter of direction was received by your firm? Do you remember?

A. What is the date of the letter?

Q. September 18th, is my recollection.

A. I came back from Seattle Saturday night. I think it was Saturday the 17th, and we had the conference in Cassidy's office on Sunday. I think that was the 18th.

Q. You got back from Seattle on what day?

A. Got back Saturday night. Left there Saturday morning and drove through. Got here about seven o'clock Saturday night.

Q. And you had a conference then in Cassidy's office when?

A. Sunday.

Q. You were personally at the conference, were you?

A. I was, yes.

Q. Who was there, who was present at that conference?

A. Mr. Cassidy was there, and Mr. Fitzgerald, and Mr. Sherrill and myself, and I think a part of the time Mr. Cassidy's brother—it may be one of the employes of Mr. Cassidy at the time.

(Testimony of Edgar J. Munnell.)

Q. What conversation occurred at that time, if any, with reference to this deal?

A. Well there was more or less talk about how it could be arranged for us to continue selling Mohawk tires in conjunction with the American Tire & Rubber Company, on what kind of a basis, and that was one of the important matters that we took up. The other matter, as I recall it, was the amount of stock that Cassidy would expect to receive from us. Mr. Cassidy had the day before, or previously anyway, or else that day some time, given Mr. Fitzgerald an order for tires, and when Mr. Sherrill and I got there to go into the matter of how many tires were to be turned over, there were to be certain changes made in that order. Mr. Cassidy sat on one side of the desk, the side he usually sits on, which would be represented by where Mr. Fitzgerald sits now, and I was on this side of the desk with a list, with this orange list of tires in my hand. Mr. Cassidy was checking off the sizes that he was going to buy, and I was showing him the number of tires we had to be turned over to him.

Q. Here is the list, Plaintiff's Exhibit 40. Is that the list you used?

A. That is the list, yes, sir.

Q. Now just explain to the jury what took place at that time with reference to that list?

A. This was an approximate list of the tires we had on hand to turn over. We were going to keep

(Testimony of Edgar J. Munnell.)

a few. The list as originally made out was made out by Mr. Fitzgerald. I added the figures here, to get an idea as to about how much stock we had on hand at that time.

Q. When did you put those figures on?

A. I am not certain when, whether it was before they were up to Mr. Cassidy's, or afterwards. Perhaps it was after.

Q. How do you determine what tires you would keep in any manner?

A. Well we tried to keep a fair assortment, a small number of tires.

Q. Was it understood there at that time by Mr. Cassidy that you had the privilege of keeping some of these tires?

Mr. BISCHOFF: I object to the question in that form, what was understood.

COURT: State what was said.

Q. State what was said at that time if anything with reference to keeping.

A. Said, "Here is an approximate list of the tires that we have to turn over." And we came to two or three sizes here that we were long on, and he had some of them ordered in this order that he had given to Mr. Fitzgerald.

Q. What occurred in reference to that, what was said?

A. I said, "you don't want to order any—here is twenty-three 34x4½ non-skid Cord. You don't

(Testimony of Edgar J. Munnell.)

want to order any of them, I have twenty-three of them." He says, "Let them come along, we can use them." That might not have been the size, but was a large amount like that, and was a size I thought he shouldn't have ordered so many on because we had this certain number to turn over.

Q. What was said with reference to your right or your power to turn over that entire list to Cassidy, if desired?

A. At no time during the talk with Mr. Fitzgerald and the talk with Mr. Cassidy was there anything said about how many we were going to turn over, it was supposed we could turn over everything we had.

Q. Did you say anything at that time with reference to the fact that you intended to keep a few tires out of that list, or otherwise? What did you say with reference to that? That is one thing I want to find out about.

A. Well if I remember rightly, Mr. Fitzgerald said, "You better go as easy as you can and not send all of those tires over to Cassidy."

Q. Did you go over the list? Did you state anything to them at that time with reference to which particular ones you would keep out? Was that stated at that meeting at all or not?

A. I don't think it was. You understand that the tires were not turned over until I think it was the 21st. Was three days there that Cassidy was

(Testimony of Edgar J. Munnell.)

drawing on that stock.

Q. Was anything said by Mr. Fitzgerald at that time with reference to what Cassidy was to do with that stock after he got it, or any of those tires?

A. I don't recall whether there was or not.

Q. Was anything said at that time by anybody present about Cassidy returning any of these tires to Frisco if he desired, if so, what was said?

A. Well I don't remember on that.

Q. Were you present at the store when the tires were sent over to Cassidy?

A. I don't know whether I was at the store at the time they were called for. I was at the store of course while we were getting them ready, as they were taken out of the racks and stacked up, ready for the trucks to come after them.

Q. How did you happen to do that?

A. Beg pardon?

Q. How did you happen to get them ready, what occurred?

A. We had two or three calls from Cassidy or his office asking when the tires were going to be ready, and as soon as we got them ready we undoubtedly phoned him and told him that they were ready.

Q. Do you know who came after them?

A. I don't know, no. I know a truck came after them.

(Testimony of Edgar J. Munnell.)

Q. What is that?

A. A truck came after them.

Q. Was it your truck?

A. No, sir, it was not.

Q. Did you pay for the truck or engage the truck?

A. No, sir, I had nothing to do with it at all.

Q. Do you know who the man was?

A. I have seen his name on the bill of lading.

Q. This name that shows on the receipt he gave you? Did you ever do business with that transfer man before?

A. No, sir, never, never before or since.

Q. Do you know whether a list of the tires turned over to Cassidy was sent to San Francisco?

A. It was.

Q. Will you state whether or not you have made any memorandum on that list showing the cost to you of the tires turned over to the American Tire & Rubber Company?

A. These are my extensions on the side of this list, yes, sir.

Q. What exhibit number is that you are referred to?

A. That is Exhibit 9, I think.

Q. You refer to the pencil notations upon Defendants' Exhibit 9?

A. Nine.

Q. Are those handwriting notations yours?

(Testimony of Edgar J. Munnell.)

A. They are mine, yes, sir.

Q. They are based upon what, Mr. Munnell?

A. Based upon our cost at the time that transfer was made September 21st.

Q. What list did you use to figure that?

A. Used list that was in effect at that time.

Q. What list was that?

A. That was list of the Mohawk Rubber Company dated May 10, 1921.

Q. And figuring the cost to you, based on that list, how much did you take off the list, what per cent?

A. Off the published list?

Q. Yes.

A. 25 and 15, plus tax.

Q. Will you state whether or not you had actually paid more than that for the tires originally?

A. Every tire in this list that we turned over to Cassidy was billed to us at a higher price than we billed Mohawk at the time of this transfer.

Q. Now you state that that list was sent where? Copy of that list was sent where?

A. The original of this list was sent to the Mohawk Rubber Company at San Francisco.

Q. Tell the jury whether or not the Mohawk Rubber Company gave you any credit for any of the tires turned over to Cassidy?

A. They did.

Q. Tell the jury what list they used in the

(Testimony of Edgar J. Munnell.)

credit they figured?

A. They used the same list and the same method of discount.

Q. And they gave you—state what the fact is about their giving you credit on that same list—for what quantity of tires, and what quantity did they refuse to give you credit for?

A. Well the net amount of the tires that we turned over to Cassidy, figuring our jobbing discount off the list of May 10th, which was in effect at the time this transfer was made, amounted to \$9814 and some odd cents, and they gave us credit for \$1079.25.

Q. Then they gave you credit only for a portion of the tires you turned over to Mr. Cassidy, is that correct?

A. That is correct, yes, sir.

Q. Will you tell the jury whether Mr. Cassidy ever said anything to yourself or to Mr. Sherrill expressing any dissatisfaction with the tires that were turned over to him?

A. Never said a word to me.

Q. Ever make any objection to the tires turned over?

A. He did not.

Q. Did he make any complaint or objection with reference to the quantity, quality or condition?

A. He did not, no, sir.

Q. Was anything ever said by him at any time

(Testimony of Edgar J. Munnell.)

showing that he was dissatisfied in any respect with the tires that you sent over to him, or anything in reference to that transaction?

A. Not a thing, no, sir.

Q. Did he offer to return to you any tires, or ask you to accept back any tires you turned over to him?

A. He did not, no, sir.

Q. Did you hear anything more about it? Until you got the red hot wire from San Francisco?

A. Not a word, no, sir.

Q. And then I want you to tell the jury, based upon the cost to you at the time you turned these tires over to the American Tire & Rubber Company, based upon the list, the replacement cost; what was the value of the entire amount of tires you turned over to the American Tire & Rubber Company—consummated that transaction?

A. \$9814.20.

Q. Will tell the jury whether you have paid into Court, outside of this controversy, these three items, disputed items, all of the sums of money that are in issue or have been in issue between you?

Mr. BISCHOFF: The records of the Court will show that, whether they did or not.

Q. Did Mr. Fitzgerald at the time he conducted this transaction with you up here in Portland, at any time he consummated these transactions, tell

(Testimony of Edgar J. Munnell.)

you that the deal he made, he didn't have power or authority to make?

A. Never did, no, sir.

Q. Did he ever state to you that these statements he made to you and this adjustment under which the line was taken away from you and turned over to Cassidy and you made this settlement, was not within his authority?

A. No, sir.

Cross Examination.

Questions by Mr. Bischoff:

Mr. Munnell, you frequently made requests of Mr. Fitzgerald to take up with the factory various allowances to be made, credits, return of merchandise, extensions and such things as that, didn't you?

A. I think we did, yes.

Q. And on each occasion when you took that matter up, didn't he tell you that he would have to refer that matter to the company for their determination?

A. No, he didn't, not in each instance.

Q. Did he make that observation to you on some occasions?

A. Some occasions he did, yes.

Q. And did he tell you that he was not in position to consent to any such arrangement without approval of the home office at Akron, the factory?

A. We might have asked him some things he didn't have authority to settle. In most of the cases

(Testimony of Edgar J. Munnell.)

he had the authority, at least he made the settlement.

Q. Among the things that he told you he couldn't arrange for without the approval of the company, was the matter of return of merchandise, didn't he?

A. He accepted return of part of it without taking it up with the factory.

Q. During 1920 you had requested from him permission to return merchandise, hadn't you?

A. Yes.

Q. And didn't he tell you then in conversation, and also write you, that such matters were out of his jurisdiction, that he would refer it and take it up with the house for you?

A. I think he did in some instances, yes.

Q. Was that matter—

A. He agreed to take some merchandise that wasn't in controversy at all.

Q. You are now referring to settlement made in November of 1920?

A. No, I am referring to something previous to that, because we returned tires previous to that.

Q. Weren't those on instructions from the office?

A. He might have had instructions, but he didn't tell us he had gotten instructions specifically from Akron.

(Testimony of Edgar J. Munnell.)

Q. At any rate, later you did find that in the matter of returning merchandise he had to get instructions from Akron?

A. There were a number of times when he hesitated without getting some special instructions.

Q. There were times when you wanted to settle part of your account by the return of merchandise, and you spoke to Mr. Fitzgerald about that, and also wrote him about it, is that right?

A. We may have, I don't know.

Q. Well you know that on several occasions you requested leave to settle part of your account by the return of some merchandise?

A. I think that was in the Summer of 1920.

Q. Well there was some in 1921 as well, wasn't there?

A. I don't recall 1921.

Q. Didn't he in that respect tell you that he had to communicate with the house, and that he would use his—the language in one of his letters, he would "go to the bat for you," to see what he could do?

A. That is in the correspondence all right, yes.

Q. You knew that. Now then in another instance that you had knowledge of, with respect to inducing the company to accept Liberty Bonds—you wanted Fitzgerald to induce them to do that, didn't you?

A. I don't think we wanted him to induce them

(Testimony of Edgar J. Munnell.)

to, we tried pretty hard to get rid of our Liberty Bonds to them, yes.

Q. Well then you wrote Mr. Fitzgerald about it?

A. Practically all of our correspondence started at the San Francisco office.

Q. And then didn't he tell you that that was beyond his scope, and that he would have to take it up with the home office?

A. I think he did, yes.

Q. Now didn't you regard this instance with respect to when he called your attention to the fact that he had no authority, as sufficient to require you to make some inquiry as to the scope of his authority when you made those various agreements that you spoke of ?

A. Practically all of our agreements were made with Mr. Fitzgerald and the factory never took any exceptions to them.

Q. You knew that the factory had sent him up here in December for the purpose of making settlement with you, didn't you?

A. I presume the factory sent him. He might have come on his regular trip, you know.

Q. They sent you a wire, didn't they?

A. No, sir.

Q. That he was going to come up and make that settlement?

A. No, they did not.

(Testimony of Edgar J. Munnell.)

Q. Didn't you—hadn't you written to the company saying you wanted to send stuff back, and they wired you don't send it back?

A. They said hold the tires.

Q. Yes. Mr. Fitzgerald is coming up.

A. Nothing said in those wires about settling the account.

Q. Now in November, 1920, when you had your major settlement and when you say he agreed to give you protection against decline, you knew then, didn't you, that both the company and Mr. Fitzgerald himself had written to you telling you that they didn't know what the situation would be with respect to declines?

A. They did. That part of it was understood fully. We would have to go after Spring dating orders on the same basis with any competitor or any other manufacturer. The Mohawk Rubber Company wasn't affected by any probable government ruling any more than the Goodyear, the Goodrich or anybody else.

Q. As I understand it now, you want the Court and jury to understand that the only arrangement you made with Mr. Fitzgerald respecting rebates was that statement in the letters of October 19th and 30th in which they wrote you what the situation was. Is that correct?

A. I am not referring to any letter at all. I am referring to verbal agreement we had with Mr.

(Testimony of Edgar J. Munnell.)

Fitzgerald, which was to the effect that if we kept the rest of this stock that we didn't turn back to San Francisco in 1920, that stock would be put in position for us to go out and sell just as though we had ordered from factory on Spring dating terms, and protect our dealer in case of decline, in case it was in his hands.

Q. Do you think Mr. Fitzgerald could go further with you and make an agreement that was broader in effect than that outlined in the two letters referred to of October 19th and October 30th?

A. That I don't know. We had no way of knowing. He came here and offered wire from the factory showing they told him to let us return some tires and take notes for the balance. We didn't know what his instructions were here. He might have had full instructions, and probably did have full instructions, we took it for granted that he did.

Q. Did you ask him anything about how you would come out as to the conditions imposed in these two letters?

A. No one had in mind, Mr. Bischoff, that there was going to be a decline in price at any special time. We didn't know there was going to be a decline in price. We wanted to be protected in case there was. There might have been a decline on May 10th, might have been some other time, might not have been at all.

(Testimony of Edgar J. Munnell.)

Q. What I am trying to get at, Mr. Munnell, is this; did you understand that Mr. Fitzgerald could make an agreement that was more far reaching in its effect than the information which was conveyed to you in Mr. Fitzgerald's letter and the Akron letter, one of October 19th and the other of October 30th?

A. Well I don't recall those letters. Are they here?

Q. Just look at them and see.

A. If they are in here they are not here in order.

Q. Here they are.

A. Well this letter of October 19th is pretty clear about what they were doing.

Q. One was from Mr. Fitzgerald, and the other from the home office, wasn't it?

A. The one of October 19th was from Mr. Fitzgerald and the other was from Mr. Fitzgerald.

Q. Don't they call your attention to the fact that they couldn't make any definite agreement as to protection against decline?

A. They were accepting them subject to any instructions from the government as to government tax on this ruling about decline.

Q. Did you expect that Mr. Fitzgerald was going to make an agreement with you that didn't include any of these conditions?

A. Absolutely not, no, sir. The government wasn't permitted—when the final bill came through

(Testimony of Edgar J. Munnell.)

and there was a decline in price, and the government wouldn't permit the protection, naturally we didn't expect any more than anybody else would expect.

Q. Have you a record here as to what Spring dating orders you took from customers pursuant to your arrangement with Mr. Fitzgerald?

A. I don't think we have.

Q. Did you make rebates to customers by reason of the May, 1921, decline?

A. Yes, sir, we did.

Q. Have you a record of what these rebates were?

A. I have not, no, sir. I have a record at the office, but I haven't it with me.

Q. You didn't bring that here, did you?

A. I don't think it is, no, sir.

Q. Are you able to tell the jury how much of this stock that you had on hand, that was left on your hands in December, 1920, was sold between that time and the time of the decline in May, 1921?

A. Well our inventory of December 31, 1920, was something like \$27,000. If I remember correctly, the amount of stock we had on hand when this decline took place in May was something like twenty or twenty-two thousand dollars, but we had purchased some goods in the meantime.

Q. So that you are unable to state which of that twenty-two thousand dollars that you had on hand

(Testimony of Edgar J. Munnell.)

in May—how much of that was stock that you had prior to December 2nd? And how much of it was acquired subsequent to December 2nd?

A. No, sir, I have no way of knowing without going to the records.

Q. You know at that time, didn't you, Mr. Munnell, that the practice of rebating for a decline was universally to allow for rebates on merchandise purchased within sixty days prior to the decline, and remaining unsold?

A. That was the custom with most of the factories, yes, sir.

Q. And notwithstanding that, you want the Court and jury to understand that Mr. Fitzgerald went further and said that you could have a rebate irrespective of when the merchandise had been purchased?

A. This is what I want them to believe, yes, sir.

Q. Now in December, 1920, of this \$35,000 worth of merchandise you had, a great deal of it had been purchased for a year or more before that?

A. No, I don't think that was. Most of it was purchased in the winter—well it was practically a year, but most of shipments were made, if I recall, from the 20th of January until about the 10th of March, 1920.

Q. Your large shipments were acquired in March, 1920?

A. Yes, sir.

(Testimony of Edgar J. Munnell.)

Q. And after that—and then another large shipment was acquired in December, 1919, the one of \$25,000 and the other of about \$20,000. Is that right?

A. I don't know.

Q. Approximately the time?

A. There were Spring dating orders shipped, I think in December, 1919. Practically all of these went direct to the dealers, and they are the orders that kept coming back to us all summer.

Q. And subsequent to this large shipment of March, 1920, the purchases were all small, weren't they?

A. Between December and March, probably were. Probably didn't amount to anything.

Q. But the greatest part of this \$35,000 you spoke of had been purchased at least as early as March, 1920?

A. Yes.

Q. You claim that Fitzgerald agreed that you could have—agreed in December, 1920, some nine months later, that you could have a rebate on that merchandise, if it were declared in the future?

A. That was his agreement, yes.

Q. That was a rather unusual proposition, wasn't it?

A. Well, we didn't think so.

Q. You didn't think so?

A. No.

(Testimony of Edgar J. Munnell.)

Q. Had any other dealer ever done anything of that sort?

A. You mean any other tire manufacturer?

Q. Yes.

A. We hadn't had any experience with any other.

Q. Ever hear of any such thing being done?

A. Well, I don't know—yes, I have since.

Q. You didn't think it was. Did you require Mr. Fitzgerald to confirm that arrangement in some manner by letter or otherwise?

A. We did not. As I told you a few moments ago, we didn't have any idea whether there was going to be a price decline or not.

Q. But you never got in writing from Mr. Fitzgerald at that time, or any subsequent time, confirmation of that part of the understanding?

A. If I remember rightly, he denied making it in May, 1921.

Q. Yes, but you didn't get anything in writing in November, when you got that?

A. No, we didn't, no, sir.

Q. Did you write any letter to him or to anybody else confirming your understanding of your arrangement?

A. I don't think we did. If I recall it, Mr. Fitzgerald was going back to San Francisco in November, 1920, for a few days; then he was going to the factory in Akron, and he wanted this matter in his

(Testimony of Edgar J. Munnell.)

hands before he went back to Akron. He was going to put it up to the factory.

Q. Pursuant to the agreement you made at that time, you made out the five notes and sent them to San Francisco?

A. Yes, sir.

Q. And why didn't you say something in that letter which would confirm your understanding that you were to get unlimited protection against decline in price, no matter when the merchandise was bought?

A. We could have put a good many things in that letter, but we didn't think it was necessary.

Q. Didn't you think that was an important consideration in coming to your arrangement?

A. There wasn't anything said in that letter, as I recall it, about on what kind of a basis these tires were going to be returned. We just took it for granted that the tires would be credited to us on the—

Q. I call your attention to letter of December 2, 1920, which you wrote accompanying the five notes, and ask you to state whether you didn't intend that to be a full statement as to your understanding with Mr. Fitzgerald?

A. It wasn't a complete statement of our understanding. No. It took care of the book account.

Q. You didn't say anything in that letter about—

(Testimony of Edgar J. Munnell.)

A. Didn't say anything about rebates or price protection or anything.

Q. Well, did Mr. Fitzgerald say anything to you at that time about the necessity of his submitting to the factory any proposition about making an agreement for rebates to cover purchases that you had made a year or more before that?

A. He did not, no, sir.

Q. He didn't.

A. We talked to Mr. Fitzgerald, pretty plainly about keeping these, and asked him to tell us how we could compete with other manufacturers if we kept that stock and didn't have protection; we were a distributor and practically in the same position as a factory branch, and that stock had to be—if we were going out to sell Spring dating, we had to be on the same basis as any other manufacturer or his branch in Portland, and he agreed to that.

Q. Now, referring to the list of stock that was forwarded to the company after the May decline, you notice that is entitled a list of stock on hand, or list of tires on hand as of May 10th, or May second—serial number of tires in stock May 14, 1921. This list was prepared pursuant to your direction?

A. Yes, sir.

Q. And forwarded by you to plaintiff?

A. Mohawk Rubber Company, San Francisco.
Yes, sir.

(Testimony of Edgar J. Munnell.)

Q. You don't say anything in that about this list including tires that had already been sold on Spring dating orders?

A. I think you will find a letter there that accompanied that list that states there.

Q. Letter that accompanied it?

A. Either the letter that accompanied it or letter ahead of it a day or so. I think the first list we sent down didn't have the serial numbers, if I remember correctly.

Q. Did you hear Mr. Auspach testify this morning that this list didn't cover any tires that were sold on dating orders or to customers but covered only the stock on hand—all of the stock on hand that you had?

A. I didn't take his testimony that way, no.

Q. You didn't take his testimony that way. Now is there any indication on these letters, if it does include tires that you sold to your dealers on dating orders, is there anything on these letters to indicate how many of these tires they still had on hand and unsold at this time?

A. No there isn't, no, sir.

Q. Even under the arrangement that you claim, you would be entitled to rebate only on stock they had on hand and unsold, wouldn't you?

A. Yes, sir.

Q. So it became necessary to communicate that information to the plaintiff before—

(Testimony of Edgar J. Munnell.)

A. I think probably they had that information before that list was made out.

Q. Now then talking about an agreement to cancel the note, that you spoke of, that wasn't made until about June 23rd, when Mr. Fitzgerald was here?

A. I don't believe Mr. Fitzgerald was in Portland after the decline, until some time in June.

Q. And then you say that Mr. Fitzgerald and you had this arrangement about cancelling a note in order to settle all claim for rebates?

A. That was it, yes, sir.

Q. And then he told you, you say, that you could hold out one note?

A. He did, yes.

Q. And not pay the note. Isn't it a fact, Mr. Munnell, that by that time all of your notes had already gone to protest?

A. I think the June note had not—we had written them to hold up the June note. I don't think more than one note went to protest. I think they charged them all back to our account, that we didn't pay up to that time.

Q. Well whether protested or not, they were all past due and had not been paid?

A. Yes, were necessarily past due, because the last one was due June 10th.

Q. Wasn't the last due May 10th?

A. I think it was June 10th.

(Testimony of Edgar J. Munnell.)

Q. Look and see—February, April and May.

A. Maybe it was the May note that we had paid—the June note we had paid. I guess it was the April-May note we didn't pay, and we paid the June note.

Q. This last note came due on May 10th?

A. The last note that we signed, if I remember rightly, the last note we signed, was due June 10th.

Q. Assuming that it did, it had already been paid before this matter came up, hadn't it, if it was paid at all?

A. The June note if it was paid was paid June 10th, probably. I don't recall the correspondence on the subject, but it seems to me that one of these notes was held up for some time, for us to pay.

Q. Now referring to the conversation with respect to turning over the stock, as I understand it from your testimony, and if it isn't right correct me, the arrangement that you claim was made was that you were to turn over the stock to Cassidy; there was no agreement that the plaintiff was to take back any stock from you, or reship it to itself?

A. The proposition was that the stock was to be taken off our hands by the Mohawk Rubber Company at what it cost us.

Q. Well that was by means of turning it over to Cassidy?

A. It was understood it was to be turned over to Cassidy, yes.

(Testimony of Edgar J. Munnell.)

Q. But you didn't understand that if Cassidy didn't desire to take any stock at all, that the plaintiff was to take back the whole or any part of your stock?

A. That was the only part of the conversation that we talked about on this subject as it came up first—that he was going to deal with Cassidy or the American Tire & Rubber Company, and we were agreeable to him giving them all or part of the territory providing our stock was taken off our hands at what it cost us.

Q. So that the only arrangement about taking the tires was an arrangement that the tires were to be turned over to Cassidy and you were to receive credit and he was to be charged with them?

A. Wasn't anything said about that the first time. Mr. Fitzgerald—

Q. The final windup of this arrangement—

A. I beg your pardon?

Q. Wasn't that the final conclusion of the arrangement?

A. The final conclusion was that the American Tire & Rubber Company were going to sell Mohawk tires, and we were to turn our stock over to them, sending a list of the sizes and serial numbers perhaps—I don't know whether he insisted on that or not, but the sizes, to the Mohawk Rubber Company at San Francisco, when we would be given credit at what the tires cost us.

(Testimony of Edgar J. Munnell.)

Q. There was no talk however, or wasn't within the contemplation of the parties that Mohawk would take back any tires itself, as distinguished from turning them over to Cassidy?

A. I don't know anything about that.

Q. Nothing of that sort discussed, was there?

A. There might have been.

Q. You don't remember?

A. I don't remember any of it, no.

Q. Now when it came to—after this arrangement was made that you spoke of, did Mr. Cassidy ever advise you as to what particular stock he wanted you to send?

A. He did not, no, sir.

Q. That is, he did not advise you there as to the particular kind or as to the quantity?

A. The only thing he said he phoned down and says, "Have you still got a 30x3½," or something like that. "I want it." That is before the load went up to him. He came down after it, and those tires were charged to the Mohawk Rubber Company at San Francisco. They were not charged to the American Tire & Rubber Company.

Q. You received credit for them too, didn't you?

A. Yes, sir.

Q. But with respect to this large shipment that went over there, you had received no instructions either as to the kind, size or quantity?

A. The instructions that we were to send over

(Testimony of Edgar J. Munnell.)

what tires we wanted, all of them, as far as that goes.

Q. That is the way you considered this letter of September 18th?

A. That is the way I considered it, and the way I considered my agreement with Mr. Fitzgerald, my talk with Mr. Fitzgerald, before he professed to have gone into the deal with Cassidy at all.

Q. After you got that letter of September 18th you didn't demur to it in any way, or find fault with it, or write to them to say that doesn't express your understanding, at any time?

A. We didn't, no, sir.

Q. You regarded that as the basis of your arrangement with him?

A. Yes, sir.

Q. Now you claim the amount of credit you were entitled to by reason of the tires turned over to Cassidy, is \$9814?

A. And some odd cents.

Q. Having received credit for \$1079.25, that would reduce the amount by that amount?

A. Yes, sir.

Q. Now Mr. Munnell, you made purchases from the plaintiff during the year 1921?

A. Yes, sir.

Q. And on all that you took advantage of the time discount?

(Testimony of Edgar J. Munnell.)

A. I think some of our payments we were given the cash discount off, and some we were not.

Q. That is, if payments were made within—

A. I think we tried to keep our bills discounted in 1921, and sent them as much as we could on account.

Q. Now the fact is, that what you were doing was taking advantage of your cash discounts during that time, while at the same time you were behind on your open account, and on your notes?

A. Our open accounts and notes were all the same. When a note became due and it wasn't paid it was thrown back into our open account by the factory.

Q. But you didn't send your payment in settlement of the earliest items of your account, did you?

A. I think you will find letter from the credit manager at Akron telling us to keep our account in shape, and pay when we could on the old account.

Q. That is the fact, however, that during this time you were making cash payment and taking cash discounts there with those notes still unpaid?

A. Yes at 7 per cent.

Q. Yes, and a substantial amount on an open account that was past due and paid?

A. When?

Q. Well say about June 1st.

A. No, sir.

Q. Wasn't there any unpaid open account?

(Testimony of Edgar J. Munnell.)

A. I think our account was paid to date until considerably after June 1, 1921.

Q. The notes were unpaid?

A. Some of our notes were unpaid, yes, sir.

Redirect Examination.

Q. You were asked, Mr. Munnell, about whether you heard of any other dealers getting the kind of a deal that Mr. Fitzgerald gave you, and now I want you to state in reference to the question, whether yours was an unusual situation? What is the fact about the city of Spokane and the Seattle distributor?

A. I just have their word for it, that they had unlimited protection.

Q. One question. I want to ask, during this time you were having this trouble with this old account, I want you to state to the jury what is the fact with reference to whether you lost all the dealers that you had—whether you were able to retain them or not?

Mr. BISCHOFF: That is objected to, may it please the Court.

COURT: What has that to do with the case? The Court has repeatedly stated there is no issue in this case except what is set out in the answer. Confine your testimony to that. The issues are perfectly simple as far as the answer is concerned, and that is the issue we are to try.

Witness excused.

(Testimony of George K. Cassidy.)

Defense rests.

GEORGE K. CASSIDY, a witness called on behalf of the plaintiff in rebuttal, being first duly sworn testified as follows:

Direct Examination.

Questions by Mr. Bischoff:

Mr. Cassidy, you did business under the firm name of the American Tire & Rubber Company?

A. Yes, sir.

Q. Did you enter into an arrangement with the Mohawk Rubber Company to purchase and sell tires for them?

A. Yes, sir.

Q. Did you receive from Munnell & Sherrill a quantity of tires in September of 1921?

A. In October.

Q. In October?

A. Yes, October, that is the date I have on my record. It might have been in September and have made a mistake in the office there. The bookkeeper kept a record of it there for me and he had it down there 9-20-21.

Q. That is September.

A. Oh, that would be September.

Q. September 20, 1921?

A. Yes.

Q. And before you received these tires had you sent any request to Munnell & Sherrill for any specific quantity of tires?

(Testimony of George K. Cassidy.)

A. No.

Q. Or for any specific sizes or styles?

A. No.

Q. Did you send for these tires?

A. Yes, I sent for them.

Q. Well who determined the quantity and amount that was to be sent over?

A. I don't know, I did not. I supposed that was arranged by Mr. Fitzgerald and by Munnell & Sherrill.

Q. You supposed about that?

A. Yes, sir.

Q. Don't you know of your own knowledge?

A. No, I had nothing to do with that.

Q. Just please confine yourself to the thing you know, and the conversations and things you were present at. Were you present when these tires arrived at your place?

A. No.

Q. When did you first see them?

A. Well, part of them were moved to the store when I got back and saw them there.

Q. Where was the rest of them?

A. On the sidewalk.

Q. Did you keep all of the tires that were sent over to you?

A. We put them all in the store.

Q. What did you do with them after that?

A. Well, we sold a part of them after that.

(Testimony of George K. Cassidy.)

Q. What did you do with the rest of them?

A. Shipped them to 'Frisco.

Q. To the Mohawk Rubber Company?

A. To the Mohawk Rubber Co.

Q. How many tires did you ship to San Francisco?

A. I believe it was 356.

Q. Will you please give us the date when that shipment was made to San Francisco?

A. That was made on—return of the old stuff to 'Frisco on 10-4 and 10-5.

Q. That was on October 4th and 5th?

A. Yes, 1921.

Q. When you arranged your deal with Mr. Fitzgerald you placed an order for a carload of tires to be sent to you from the factory, didn't you?

A. Yes, sir.

A. And when did you receive that factory shipment?

A. It would be on October 11, 1921.

Q. That was subsequent to the time that you returned or sent the tires to San Francisco?

A. Yes; we got passing reports on this carload of tires through the railroad company as it came in, and we found out that the car was getting pretty close to Portland, so to get this stuff out of the way we shipped it to 'Frisco.

Q. Did you ever tell Mr. Sherrill that you re-

(Testimony of George K. Cassidy.)

turned these tires after you got your fatcory shipment?

A. No.

Q. In what condition were the tires that you sent back to San Francisco?

A. Well, the paper was—

Q. You may state, Mr. Cassidy, what the condition of these tires was when you received them.

A. Well, they were tires that looked as if they had been handled around quite a bit; wrapped in paper, and the paper had been pulled off of it; about half wrapped up; tires that are handled around pretty much paper comes off of them pretty easy.

Q. What was the condition of the lot of tires you received as to their being current stock, as to current sizes and styles?

A. Were lots of tires in there that I didn't have any use for; I didn't have any demand for, because I had very little dealers' business.

Q. Is that the reason you sent these down to San Francisco?

A. No, not especially; I was kind of in between the two fellows. My understanding was these tires were to go to 'Frisco, whatever I had left.

Q. Of course, no question you were in between. We want to have the facts; not your understanding. What was the conversation?

A. Well, ask me and I will answer.

(Testimony of George K. Cassidy.)

Q. All that transpired; not what you thought about it; you understand the question?

A. What was the question?

Q. I will repeat it. I want to know whether the reason for returning these tires to San Francisco was because of the fault you found with their condition?

A. No.

Q. Or saleability?

A. No.

Q. Why did you return them to San Francisco?

A. My instructions from Mr. Fitzgerald.

Q. When did you get those instructions?

A. Well, in the course of the conversation when I took on the line of tires.

Q. When did that conversation take place?

A. Some time previous to September 20th; previous to the time I got the tires over from Munnell & Sherrill.

Q. Was the lot of tires you received from Munnell & Sherrill satisfactory to you?

A. Yes, they were. We sold some sixty out of there before the carload came.

Q. Aside from the ones you sold, the others—were the rest of them satisfactory to you and acceptable?

A. No, they weren't. At that time Mohawk was coming out with a new flat tread cord. We wanted the new latest tires. I had just signed up a new

(Testimony of George K. Cassidy.)

contract with Mohawk and I wanted new, fresh goods.

Q. This conversation you had with Mr. Fitzgerald that you spoke of, was that at the time that Munnell & Sherrill was there, or was that at some other time?

A. I don't believe Munnell and Sherrill were there. Between Fitzgerald and myself personally.

Q. As I understand it, then, you sent them back because they were unsaleable or not satisfactory or acceptable to you, because—there was a new style of tread being put on the market?

A. That is one of the main reasons, yes; the other was that any goods that Munnell & Sherrill shipped over to the Cassidy Tire—the American Tire & Rubber, which was the name of the company at that time—I was to accept—that was my understanding; and whatever I sold out of there the Mohawk Company was to bill me for, and whatever was left when the carload of new stuff arrived I had the privilege of shipping to 'Frisco, which I done.

Q. You say that was your understanding?

A. Yes.

Q. Did you have any conversation to that effect with anybody?

A. Yes, I just told you I had a conversation with Mr. Fitzgerald.

Q. Was that what he said to you?

(Testimony of George K. Cassidy.)

A. Practically those words, yes. I have a number of letters substantiating that in my file.

Q. Now, you had a talk with Mr. Fitzgerald and with Munnell & Sherrill regarding the taking of some stuff from Munnell & Sherrill?

A. Yes, sir.

Q. Now, in that conversation, wasn't it understood, or wasn't it directly stated by all concerned, that the stock which you were to take was to be current, saleable stock?

A. No, I don't believe so; I don't think it was brought up at all.

Q. What was said?

A. If it was brought up, it was brought up when I was out of the office, and didn't hear it.

Q. Did you say anything at all as to what kind of stock you wanted or would take from Munnell & Sherrill?

A. No. I did make this remark in checking over the stock that they had that there was some stock there or some sizes which I absolutely would have no use for at all. I had particular reference there to some thirty-five, four and a half Q D clinchers which I never did stock.

Q. Did they send any of those?

A. I think sent a couple of those; their stock sheets would show.

Cross Examination.

Questions by Mr. Liljeqvist:

(Testimony of George K. Cassidy.)

Now, Mr. Cassidy, I don't quite understand you with reference to 35x41½ Q D clinchers. What conversation did you have with reference to those when you went over the list?

A. Why, we didn't have any special conversation; just I remarked in glancing over that stock list that there was a number of sizes there that I didn't have any use for.

Q. Who was present when you said that?

A. Mr. Munnell, Mr. Sherrill, Mr. Fitzgerald and myself.

Q. What was supposed to be done about it?

A. The understanding was that all those tires that came over to me that I didn't use and sell, were shipped to 'Frisco.

Q. That is, the reason—the real reason was that you were taking over the whole Mohawk line?

A. Yes, sir.

Q. Mr. Munnell and Mr. Sherrill were cleaning up—getting out of it?

A. I don't know what their understanding was with Mr. Fitzgerald. That was my understanding.

Q. And you had an understanding there with Mr. Fitzgerald that the stuff that Munnell & Sherrill had, whatever they wanted to send over to you, you were to take it?

A. Yes, sir.

Q. And you were to sell what you could, and

(Testimony of George K. Cassidy.)

what you couldn't sell you were to return to 'Frisco and they would give you credit?

A. Just about word for word what Mr. Fitzgerald told me. If it hadn't been that way I wouldn't have accepted them.

Q. Wouldn't have accepted the agency?

A. Wouldn't have accepted the tires.

Q. Well you did accept. The tires were accepted by you, weren't they?

A. Yes, sir.

Q. You didn't make complaint to Munnell & Sherrill later with reference to the tires?

A. No, sir.

Q. Quantity, condition or number?

A. No.

Q. The amount you got was accepted by you, wasn't it?

A. Yes, sir.

Q. When you got these tires you sold what you could, and your order from the factory came quicker than you expected, as a matter of fact?

A. Carloads come through pretty quick. We naturally wanted to get some Mohawk tires in there to have to sell when we signed up a contract to take on the Mohawk agency.

Q. However, the carload of tires coming from the factory—didn't that carload come through quicker than ordinarily you would expect a carload to get through?

(Testimony of George K. Cassidy.)

A. Yes, it did.

Q. Yes, when you received these, the stock went back to 'Frisco quicker than it otherwise would?

A. Yes.

Q. If, for some reason the factory had been short of them, you would have been compelled to sell from this stock turned over by Munnell & Sherrill a considerable time, wouldn't you?

A. Yes.

Q. Now, out of the stock that came to you, how many did you sell approximately?

A. I believe 67 tires were sold.

Q. At that time the Mohawk people were coming out with a new tread?

A. Yes, coming out with new flat treads.

Q. And naturally any tire when the factory is changing the tread, they are out of date unless they get the new tread, aren't they?

A. Yes.

Q. In your experience in handling tires, isn't it a fact the minute a new line does come out it begins to render your stock not as desirable as it was before, and you try to make some deal with the factory to get rid of the present stock and take new stock?

Witness excused .

MORRIS E. MASON, a witness examined on behalf of the plaintiff whose testimony was taken by deposition, testified as follows:

(Testimony of Morris E. Mason.)

Q. 14: Did the plaintiff ever employ defendants to act as agents in any capacity whatsoever?

A. 14: No, it did not.

Q. 15: What business relations did plaintiff and defendants have?

A. 15: The defendants were distributors for the Mohawk tires and tubes in the City of Portland, as well as certain territory in that vicinity. This territory is outlined in my letter to Munnell & Sherrill, written on June 18th, 1919, a copy of the original of which I am asking the notary to attach and mark exhibit "C," the original having been sent to the defendants. In acting as distributors for the Mohawk Rubber Co. of New York, Inc., products, Munnell & Sherrill agreed to purchase all the goods which they handled, outright.

Even in the matter of claims or adjustments on defective goods they had no definite authority from us to handle them, except under their own responsibility. They were strictly an independent organization purchasing out goods for resale, and in no way definitely connected with us.

The defendant was responsible for the insurance and the payment of taxes on all goods bought from us. We sold the goods f.o.b. San Francisco, or the factory at Akron, Ohio, subject to their terms of payment as outlined in our letter of June 18, 1918.

Q. 16: Was any written agreement entered into

(Testimony of Morris E. Mason.)

between the plaintiff and defendants? If there was, please produce the agreement and have the same marked by the commissioner for identification.

A. 16: The only written memoranda of any sort entered into by The Mohawk Rubber Co. of New York, Inc., and Munnell & Sherrill, was that outlined in my letter of June 18th, 1919. This letter served as a confirmation merely of the relations to exist between the defendants and ourselves.

Q. 17: Was any agreement ever entered into between the plaintiff and defendants, by the terms of which defendants were given the right to return at will, tires and tubes to be credited to their account?

A. 17: No.

Q. 18: Were tires and tubes ever returned by the defendants to the plaintiff? If your answer is in the affirmative, please state the circumstances under which that was done and what arrangement was made between plaintiff and defendants with respect thereto.

A. 18: Yes. In instances in which goods were returned to us by defendants, this action was taken either after we had given definite authorization, or the defendants taking a chance of our refusing to accept them. We have always reserved the right to reject merchandise returned without definite authorization and approval of the home office.

(Testimony of Morris E. Mason.)

Q. 19: Do you know W. G. Fitzgerald? If your answer is in the affirmative, please state what his connection is with the plaintiff company and state in detail the nature, character and extent of his duties and authority conferred upon him by the plaintiff.

A. 19: Yes. Mr. Fitzgerald is manager of our San Francisco Branch. He has authority to conduct the routine business of the branch, operating at all times subject to the orders of this office. He has no authority to enter into agreements, contracts or leases, which are not especially approved by the home office at Akron. He has no authority to draw upon company funds except for small and minor expenditures.

Q. 20: Was the agreement of employment with W. G. Fitzgerald oral or in writing with respect to the scope of his authority? If in writing, please produce the original agreement and if oral, please state what conversation you had with Mr. Fitzgerald with respect to the scope of his authority, stating when and where such conversation was had and everything that was said in respect thereto.

A. 20: Oral. Mr. Fitzgerald has received no complete, definite, written instructions covering all of his duties. At the time he took charge of our San Francisco Branch, which was May 1st, 1919, he spent some time in the office at Akron, Ohio, receiving instructions as to his duty and authority in

(Deposition of Morris E. Mason.)

connection with his management of the branch. Such oral instructions have been supplemented from time to time by letters covering some specific instance or question.

In these oral instructions Mr. Fitzgerald was told that he had no authority to sign or to bind this company on leases or contracts of any nature. That all such agreements must be subject to my approval at Akron, Ohio. This included all special agreements, written or otherwise, covering the assignment of any territory other than an individual city, where special distributors' prices or special terms of any kind not enjoyed by regular dealers' trade, were given.

Q. 21: Was W. G. Fitzgerald ever authorized to make contracts with purchasers of tires, either as retailers or jobbers, or in any other capacity, giving them unlimited protection against declines in prices?

A. 21: Absolutely not.

Q. 22: Was W. G. Fitzgerald ever authorized to make an agreement with the defendants in September, 1921, or at any other time, by which defendants would have the right to turn over their entire stock of tires to the plaintiff or its agents and receive credit therefor?

A. 22: No.

Q. 23: Was there any well known custom or practice in the tire trade throughout the country

(Deposition of Morris E. Mason.)

with respect to protection against declines in prices?

A. 23: Yes there was.

Q. 24: If there was any such a general well known custom or practice, please state what that custom was.

A. 24: It was the custom of The Mohawk Rubber Company of New York, Inc., to allow rebates on tires purchased within 60 days from the date of the reduction in price, on hand and unsold at the time of such reduction. This was the general rule of practically all rubber companies in 1919-1920 and up to within approximately the last year. The Mohawk Rubber Company of New York, Inc., required that an inventory of the sizes, styles, and serials of the various tires, as of the date of the price change, be submitted to them. From this record the various tires were checked against the date of purchase, the serials identified with the original shipping records, and if found correct, the rebate passed in the shape of a merchandise credit. Other companies did not always require the serial inventories but accepted affidavits from their customers as to the goods on hand and entitled to rebate.

Q. 25: Was W. G. Fitzgerald ever authorized to enter into an agreement with defendants by which they could turn over the whole or any part of their stock of tires to the American Tire & Rub-

(Deposition of Morris E. Mason.)

ber Company and receive a credit therefor from the plaintiff.

A. 25: No.

Q. 26: Have you any letters or telegrams received by the plaintiff from the defendants between November 1st, 1920, and the present time? If you have please produce all of said letters, telegrams or other documents received by the plaintiff, state when and where and under what circumstances each of the letters were received and have the same marked for identification by the commissioner.

A. 26: No, we have no letters or telegrams in our possession at the present time which we received from the defendant between 1920 and the present time.

Q. 27: Have you copies of letters, telegrams and other documents sent by the plaintiff to the defendants between November 1st, 1920, and the present time? If you have, please produce the same, state when, where and by whom the original letters were written and sent; whether the copies which you have produced are true and correct copies of the documents sent to the defendants and have the same marked by the commissioner for identification.

A. 27: Yes, we have several copies of letters and telegram sent from this office, and from the office of our San Francisco Branch to these defendants.

On April 5th, 1920, I wrote Munnell & Sherrill

(Deposition of Morris E. Mason.)

a letter, a true copy of which I hereby produce. This letter was written from Akron, Ohio, and in this letter we outlined our position in regards to any reduction claimed by Munnell & Sherrill. I am handing this to the notary and am asking her to identify it as exhibit "D."

Also, on Nov. 9th, 1920, I wired Munnell & Sherrill of our intention of refusing to accept their returning their entire stock, a true copy of this telegram I herewith produce, and ask the notary to mark it exhibit "E."

On the same date, that is, Nov. 9th, 1920, I wrote a lengthy letter to Munnell & Sherrill, fully outlining our position in regards to their returning the stock which they had on hand at which time we absolutely refused to allow them to return all of their stock. A true copy of this letter I am herewith handing the notary and shall ask her to identify it as exhibit "F."

A further letter was written by me on Nov. 14th, 1921, to Munnell & Sherrill of Portland, Oregon, again reviewing the situation and again taking up the matter of price reduction with them. A true copy of this letter I am herewith handing the notary and asking her to identify it as exhibit "G."

All of these letters as well as the telegram were sent from the office at Akron, Ohio, on the dates above indicated, and they are all true copies of those letters.

(Deposition of Morris E. Mason.)

Q. 28: State any other facts or circumstances that you may know of regarding the controversy between the plaintiff and defendants upon which you have not been specifically interrogated.

A. 28: I believe that there are no other facts or circumstances of which I know regarding the controversy between ourselves and defendants, and upon which I have not been interrogated, and which are not fully covered either in the exhibits which we have offered, or which have not been covered by the direct questions hereinbefore asked me.

Wednesday, June 20, 1923, 9:30 A.M.

I. H. PECK, a witness called in behalf of plaintiff in rebuttal, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Bischoff:

Mr. Peck, you live here in Portland?

A. Yes.

Q. You are now in the employ of the Mohawk Rubber Company?

A. Yes, sir.

Q. How long have you been in the employ of the Mohawk Rubber Company?

A. Six months.

Q. Where were you formerly employed?

A. By the Cassidy Tire Company, of Portland.

Q. Were you present at a conversation that

(Testimony of I. H. Peck.)

took place between Mr. Sherrill, Mr. Cassidy and yourself?

A. Yes, sir.

Q. State when and where that conversation was held?

A. I don't remembred the exact date the conversation was held; it was held in Mr. Cassidy's office.

Q. State as near as you can the time, approximately.

A. I believe it was in March.

Q. Of this year?

A. Of this year, yes, sir.

Q. Who was present?

A. Mr. Sherrill, Mr. Cassidy and myself.

Q. Will you state how you came to be there, what you were doing, and the circumstances attending that interview?

A. I had come into Portland off the road, and was making a call on Mr. Cassidy, was in his office. Mr. Sherrill came in to pay Mr. Cassidy a visit.

Q. You came to call on Mr. Cassidy in a business way?

A. Yes, sir.

Q. Soliciting trade?

A. Yes, sir.

Q. Was Sherrill there when you came in, or did he come in later?

A. He came in later.

Q. State what conversation you had at that time?

(Testimony of I. H. Peck.)

A. We were visiting along, and the question of this trial came up, and Mr. Sherrill said, "I have always liked Mr. Fitzgerald very much, and if this case comes to court I will have to bring up matters which will put Mr. Fitzgerald in a bad light with the Mohawk factory, which he represents, because Mr. Fitzgerald has made special agreements with me which I am satisfied were not known by the factory."

Q. Did he say what those special agreements were?

A. No, he didn't go into that at all.

Q. You were working for Mr. Cassidy at the time that this lot of tires came over from Munnell & Sherrill in 1921, September, 1921?

A. Yes, sir.

Q. Were you there when the tires came?

A. No, sir, I wasn't there when the tires were received at the store.

Q. How soon afterwards did you come in?

A. Well the tires came in some time during the day, and I was out making my calls for the day. I didn't come in until evening. I presume it was about 5 o'clock when I first saw them.

Q. Was Cassidy there at the time?

A. Yes, sir.

Cross Examination.

Questions by Mr. Liljeqvist:

This conversation you claim that you heard be-

(Testimony of I. H. Peck.)

tween Cassidy and Sherrill, you don't know what special agreement he was talking about?

A. No, sir.

Q. He simply made some offhand remark that he liked Fitzgerald, and Fitzgerald made some agreement with him that wasn't known to the factory?

A. Yes, sir.

Q. You don't know where he got that dope, whether Fitzgerald claimed to him later on that that was the case, or not?

A. No, sir.

Q. You don't know, as a matter of fact, that Mr. Fitzgerald didn't have authority to make the contracts that he did make, do you?

A. I know nothing of Mr. Fitzgerald's authority.

Witness excused.

W. G. FITZGERALD, called by the plaintiff in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

Questions by Mr. Bischoff:

Mr. Fitzgerald, I show you this card, and ask you what that represents?

A. This card enumerates all the receipts or purchases of Munnell & Sherrill, that is the tires, from Mohawk Rubber Company.

Q. Is that an original record from your office

(Testimony of W. G. Fitzgerald.)

of the purchases made during the period of time indicated on the card?

A. Yes, sir.

Mr. BISCHOFF: I offer it in evidence.

Mr. LILJEQVIST: Who made this record?

A. That is our office record.

Mr. LILJEQVIST: Of the company's sales too?

A. Yes, sir.

Received without objection and marked "Plaintiff's Exhibit JJJ."

Plaintiff's Exhibit JJJ

BUSINESS CARD

Munnell & Sherrill

Branch, Frisco.

Portland, Oregon

Months	Year 1919	Year 1920	Year 1921	Year 1922
January		1,390.19	29.73	
February		1,721.76	129.38	
March	4,093.34	20,488.22	584.78	441.21
April	5,104.88	2,968.34	878.13	22.50
May	2,929.49	2,084.06	3,898.78	
June	2,066.87	2,749.94	814.33	
July	2,486.82	641.57	2,475.13	
August	4,223.74	934.13	2,899.53	
September	7,188.22	8,468.57	1,145.43	
October	4,597.05	4,338.56	673.19	
November	1,306.72	166.23	117.18	
December	25,837.52			
Total	59,854.65	45,951.52	13,645.59	

(Testimony of W. G. Fitzgerald.)

Q. Mr. Fitzgerald about how often did you—how many times did you call on Munnell & Sherrill during 1920, prior to November? That is, prior to the interview at the end of November, which resulted in the getting of five notes?

A. Well I should say four times during that period.

Q. And in what capacity did you call here on them?

A. In what capacity did I call on Munnell & Sherrill?

Q. Yes.

A. In the capacity of salesman, to sell them goods.

Q. Let me ask you at this time, what is your position with the Mohawk Rubber Company?

A. I am the Coast Manager.

Q. That is your title?

A. Coast Manager.

Q. What was the express authority granted to you in the management of the business?

A. The only—

Mr. LILJEQVIST: I would like to know if that authority is in writing, if so the writing is the best evidence.

Q. Did you have a written agreement?

A. No.

Q. Whatever authority was conferred on you was oral?

(Testimony of W. G. Fitzgerald.)

A. Yes.

Q. Who gave you your instructions or your authority?

A. Mr. M. E. Mason, our Sales Manager.

O. At Akron, Ohio?

A. Yes, sir.

Q. What was the authority conferred on you in this business?

A. Well the only authority that myself or any manager of the Mohawk Company possesses, outside of Mr. Mason, is to go out and sell goods. We have prices to sell this merchandise at, and if there is anything—any special arrangements to be made outside of regular, we have to take these things up first with Mr. Mason before we can act.

Q. Does Mr. Mason fix the prices at which you can sell?

A. Well I don't know whether Mr. Mason himself fixes them, but our instructions come from Mr. Mason.

Q. You are furnished with prices at which you are to sell?

A. Yes, sir.

Q. And have you any authority to deviate from these prices?

A. Not the slightest.

Q. Who furnishes you with the terms of sale?

A. Mr. Mason.

Q. Now was there ever any authority granted to you to release payment of notes?

(Testimony of W. G. Fitzgerald.)

A. No, sir.

Q. Or to grant credits?

A. No, sir.

Q. Who did that in the management of the business?

A. Well when we began to do business with Munnell & Sherrill our credit department at that time was in charge of a gentleman by the name of Fisk.

Q. I don't mean the name of the person; but what part of this institution handles these matters?

A. The Credit Department at Akron.

Q. At Akron, Ohio?

A. Yes, sir.

Q. As I understand it, your authority in respect to this business is that of sales?

A. Strictly.

Q. Except such special instructions as you may get to do any particular thing?

A. Yes, sir.

Q. When you made these calls upon Munnell & Sherrill during 1920, you say that was in your capacity as salesman for the Pacific Coast?

A. Yes, sir.

Q. Now on those occasions did either Mr. Munnell or Mr. Sherrill request any accommodations from you in the way of privileges of returning merchandise?

A. Yes, sir.

(Testimony of W. G. Fitzgerald.)

Q. Or credits or things of that sort?

A. Yes, sir.

Q. How often?

A. Well I couldn't say how often, but in each instance I told them I would take the matter up with our factory and see what I could do.

Q. Did you ever give him permission or grant his request on the spot?

A. No, sir.

Q. Without taking them up with the factory and obtaining specific direction therefor?

A. No, sir, I did not.

Q. Did you ever state to Mr. Munnell or Mr. Sherrill on these occasions whether you had or had not authority to do the things that were requested of you?

A. Well I think Mr. Munnell and Mr. Sherrill generally understood that my authority was limited.

Q. Did you ever say that to them?

A. I have, I have told them that.

Q. What did you tell them in that respect?

A. Well in each instance where they asked for something that was beyond my authority, why I have explained to them that I had no right to do this or do that, but I would have to take it up with the factory.

Q. As I understand it, you were frequently using your endeavor to obtain from the factory favorable consideration of their requests?

A. In every instance.

(Testimony of W. G. Fitzgerald.)

Q. Now coming then to the interview of November—latter part of November, 1920—what was it that brought you up here at that time?

A. Well the principal thing that brought me up here was to see if I couldn't get Munnell & Sherrill's account straightened out, that is, obtain some cash. The account was in arrears, and that was my principal reason for coming up here.

Q. Now, prior to your coming up, there had been considerable correspondence in which they insisted on returning merchandise to offset their account?

A. That is true.

Q. And when you came here what disposition was made of their account?

A. Well when I came it was agreed—after I got authority from my factory—to allow them to return a sum of goods amounting to about \$6500, if I am not mistaken and that that \$6500 worth of merchandise which they returned and the notes which they gave us a few days afterwards, which were mailed to us—that took care of their account to date, as far as I know.

Q. This \$6500 worth of merchandise which you spoke of, that was part of the purchase made originally for this Miles & Clark order?

A. Yes.

Q. And which they later were required to take back?

(Testimony of W. G. Fitzgerald.)

A. Yes.

Q. Causing them, as they regarded it, a surplus of stock?

A. Yes.

Q. Now was there anything said at that time with respect to rebates for decline in prices?

A. Yes there was. Mr. Munnell or Mr. Sherrill, I don't know which one of these gentlemen did say, probably it was both of them—this matter of price protection came up and we talked the thing over and I told them that there was a possibility of getting price protection, but I couldn't guarantee them anything, because at that time this matter of price protection was up to the federal commission, and nobody knew whether there was going to be any price protection or not, so, if my recollection serves me correctly, Mr. Munnell and Mr. Sherrill remarked, "Well if that is the case we will have to abide by the Federal Commission's decision." So there was nothing further said about price protection.

Q. Was there anything said when they approached the subject of price protection—did you say anything to them about their right to any price protection in any event on merchandise that had been purchased long before that time?

A. I did not.

Q. Was that subject discussed at all at that interview?

(Testimony of W. G. Fitzgerald.)

A. I don't remember whether it was or not.

Q. What you have testified, was that all that was said on the subject of price protection?

A. I think so.

Q. Now did you say anything to them at that time about your authority to give them any agreement of that sort?

A. I don't remember whether I did or not, but nevertheless Munnell & Sherrill understood just how far my authority extended, and even though I had agreed to give them price protection, they knew that I would have to first take it up with the factory.

Q. Have you a recollection of the date when that interview took place?

A. Why no I haven't, Mr. Bischoff, not the exact date. I failed to bring that data with me.

Q. You know it was the latter part of November?

A. I know that, but I don't know the exact date.

Q. I call your attention to a letter which you wrote to Munnell & Sherrill on November 10, 1920, in which you go over the situation with them and tell them that "you must not forget that the writer's authority with this case is limited to certain matters such as selling goods, territorial arrangements, etc. When it comes to credits and things of that calibre you are dealing with the credit department. Of course after we have made sale of the goods the

(Testimony of W. G. Fitzgerald.)

matter passes out of our hands and goes to the credit department at Akron, and we have no authority to take action on matters pertaining to their department." With this letter in mind are you able to fix more definitely the time when this interview took place?

A. No I am not, Mr. Bischoff, but I think there is a telegram or letter in evidence there stating the date when I was here.

Q. Let me call to your mind whether another fact that may help you to determine the date. The notes which were given pursuant to that interview are dated December 2nd, so that I take it this interview you refer to was some time between the date of this letter November 10th, and December 2nd.

A. It was, I know that; I am positive of that.

Q. Are you able to state about how long before these notes were received this interview took place?

A. Well I should say about a week or ten days afterwards. I thing I was here around about the 20th of November.

Q. Now referring to the accounts, the open account and the notes which were given, what was the situation with respect to this during the Spring of 1921?

A. Well when these notes matured they were not met.

Q. Two of them were paid?

A. Possibly so.

(Testimony of W. G. Fitzgerald.)

Q. Don't you know of your own knowledge anything about that?

A. No, I do not.

Q. You know at least three of them were not paid as they matured.

A. Yes.

Q. And do you know what the condition of the open account was during the Spring of 1921, about May or June?

A. Why offhand I couldn't give you definite information on that.

Q. I don't mean the amount of the account. Was it past due—

A. It was—

Q. Or paid up?

A. It was past due.

Q. Now you had an interview with them about that situation in June, 1921, didn't you?

A. I did.

Q. And do you know exactly just what it was that brought you up here?

A. Well I came up on my regular trip, and of course on those regular trips I usually took care of any things of that nature that might occur in my territory at the time.

Q. That is, if they were behind in their accounts?

A. I tried to collect them.

Q. Tried to speed up payments and things of that sort?

(Testimony of W. G. Fitzgerald.)

A. Yes, sir.

Q. Now prior to your coming up here in June, 1921, you had received a list of tires on which they claimed a rebate?

A. That is true.

Q. That is, a decline in price had been announced on May 10, 1921?

A. That is correct.

Q. They sent you a list, by serial numbers, of the tires?

A. They did.

Q. Now did you see them—talk with them about that situation when you came here in June?

A. Why yes, we talked that matter over, and I mentioned to Mr. Munnell and Sherrill that I thought they had sent us in a list of every tire they had in stock, and whether or not they agreed with me, I don't remember; whether they said they really had sent in a serial of every tire they had in stock, or not, I don't remember. However, this rebate proposition was spoken of, and—

Q. Let me interrupt you for a moment. Don't you know as a matter of fact whether that list contains stock that had been purchased in the Spring of 1920?

A. A great portion of it had.

Q. Do you know whether there was any stock on that list that had been purchased in 1919?

A. I think there was; I am sure there was; in fact I know there was.

(Testimony of W. G. Fitzgerald.)

Q. Now what did you say to them in that respect?

A. Well when getting back to these notes, when Munnell & Sherrill presented us with these notes this price protection proposition was gone into, and I told them I would take this matter up with the factory, and presumed that in all probability they would be given price protection, but nothing ever came of it.

Q. The company never allowed it. Now what was said with respect to these old purchases that you called attention to at the time you were talking at this June interview?

A. Well they agreed that there was a good deal of merchandise on that list that they were really not entitled to rebate on.

Q. Now was there anything said at that time in respect to your cancelling a note or discharging a note that they had given?

A. There was.

Q. Who suggested that proposition?

A. Well I remarked to these gentlemen that if we were to give them a rebate covering every tire that was on that list, that it would probably amount of \$3500 or \$4000, and they agreed that it would, and whether or not I remarked myself that if I got them a rebate it wouldn't amount to over—it wouldn't exceed one of these notes, or whether Mr. Munnell or Sherrill suggested that one of these notes

(Testimony of W. G. Fitzgerald.)

be turned back to take care of a rebate, I don't know, but however, I did take that matter up with the factory and suggested that.

Q. Did you agree with them at that interview that a note would be cancelled?

A. No, I did not.

Q. What did you say to them about that?

A. I told them that I would take the matter up with the factory and endeavor to have one of them cancelled.

Q. Did the factory ever permit that to be done?

A. They did not.

Q. Is that all that was said about that proposition?

A. Well the thing drifted along—

Q. I mean at this June 1921 interview?

A. Yes, sir.

Q. Did you ever tell them at that interview or at any other that they could hold out the last note, or any other note, and not pay it?

A. Why I suggested to them that until they found out definitely just what they were going to get, to go ahead and pay the notes, pay all of the notes with the exception of one, and if they wanted to, why to hold that out until they did get the rebate they were entitled to.

Q. And did you tell them upon what basis you could adjust the rebates with them?

A. I did not.

(Testimony of W. G. Fitzgerald.)

Q. Was there any talk about that at all?

A. No.

Q. Had you received any—up to that time, up to this interview of June 18th, had you received any instructions from the home office authorizing you to agree to a cancellation of any of the notes?

A. I did not.

Q. Or to vary from the terms of the rebate as set forth in the announcement of May 10th?

A. No, sir.

Q. Now, when was the next time that you had an interview with Munnell & Sherrill during that year?

A. Well I believe it was in September of the same year.

Q. And that was the interview in which the business relationship was terminated?

A. It was.

Q. What was it that brought you up to Portland on that occasion?

A. Well there was two things brought me up to Portland. One thing was to try to effect a settlement with Munnell & Sherrill and the next thing was to, if possible, make another connection.

Q. The account continued to be in an unsatisfactory state?

A. It did.

Q. Right up to September?

A. It did.

(Testimony of W. G. Fitzgerald.)

Q. And was there any further correspondence during that period of time with respect to the return of merchandise?

A. I don't recall.

Q. At any rate, conditions were unsatisfactory and you came up here with the idea of making some other connection?

A. Yes, sir.

Q. Had you any in mind, or had you had any correspondence with respect to another arrangement with anybody?

A. Mr. Cassidy, the gentleman who testified here yesterday was in San Francisco probably thirty days before my trip up here in September, and he dropped into my office and made inquiry regarding the Mohawk line, and told me that if ever we felt so inclined to make a change in our Portland connection, that he would be glad to give our proposition consideration. So I felt quite sure there was a possibility there of placing our line, and when I came up here on that trip in September—

Q. Had he communicated with you at all before you came up?

A. Yes, he had.

Q. In what way?

A. A telegram.

Q. What did he tell you?

A. Asked me when I could be in Portland.

Q. Did you come up to Portland?

(Testimony of W. G. Fitzgerald.)

A. I did.

Q. How soon after you got that wire?

A. About a week afterwards.

Q. Did you see Cassidy before you spoke to Munnell & Sherrill?

A. I did not.

Q. Spoke to Munnell & Sherrill first?

A. Yes, sir.

Q. What conversation did you have with Munnell & Sherrill when you came up on that occasion?

Q. Well I informed Mr. Munnell & Sherrill that there was a possibility of our being able to make a connection with the Cassidy Tire Company, that is particularly to sell them large sizes, which were designated as truck sizes of tires, that is, tires of six, seven and eight inches cross-section, diameter, and I wanted to know if they had any objection to my selling Mr. Cassidy these sizes if I could, and they told me they didn't have any objection, to go to it. So with that I went over to see Mr. Cassidy, and as I remember, he gave me an order for about twenty-five or thirty of these large sized tires. He says, "Now Fitzgerald," he says, "when these tires come in here I am going to put in service immediately, and if they are as good as I think they are then we might come in later on that line." So I wired to San Francisco to have these tires sent up here immediately, and they came up immediately by boat. I caught the train a day or two after I

(Testimony of W. G. Fitzgerald.)

had gotten this order, and I went to Seattle, and from Seattle to Tacoma, so meantime these tires arrived in Portland, and Mr. Cassidy, after looking them over thought so well of them that he immediately endeavored and did finally get in touch with me over the long distance telephone; he caught me at Tacoma, and he said, "If you will come back to Portland immediately," he says, "we are willing to take on the whole line. I like your merchandise, it looks good." So I came back to Portland a day or two afterwards, and this final settlement was negotiated.

Q. When you came back to Portland you had an interview with Cassidy, and ascertained through him that he would take on the entire line?

A. I did.

Q. After that interview did you go to see Munnell & Sherrill?

A. I did.

Q. State what took place at that time, what was said.

A. Well during my conversation with Mr. Cassidy, before I went over to see Munnell & Sherrill—Munnell & Sherrill at that time were operating a retail store in conjunction with—that is separately from their wholesale establishment. Mr. Cassidy thought it would be an awfully good idea if we could retain Munnell & Sherrill as local distributors, so with that idea in mind I went down

(Testimony of W. G. Fitzgerald.)

to see Munnell & Sherrill and told them of my conversation with Mr. Cassidy, and I suggested his proposal, and it was agreeable to them. So to find out just what stock Munnell & Sherrill did have Sherrill and myself took stock, or took his stock, and I am under the impression that we only took, that is physically, about half of the stock, and that was on the lower floor. The rest of the stock, I think on the records that were contained on these sheets that he had with him yesterday, came from their card records; but on that point I am not positive, it might have been possible that we took the entire stock physically.

Q. Now you had a talk with them in reference to the termination of the relationship with them and the transfer of the account to Cassidy?

A. Yes.

Q. And part of that transaction was that Munnell & Sherrill could continue to buy for local distribution from Cassidy or through Cassidy?

A. Yes.

Q. Not from the factory. Now was there any—what conversation if any took place with respect to their stock of merchandise that they had? Who brought up that subject?

A. Yes. Now Munnell & Sherrill in their records, that is the records we were looking over here yesterday, there were a lot of goods in there that were saleable, and there were a lot of goods that

(Testimony of W. G. Fitzgerald.)

were not saleable, that is, at current prices, unless you wanted to go out and sacrifice them. So the following morning after that stock was taken Mr. Munnell and Mr. Sherrill, Mr. Cassidy and myself held a conference in Mr. Cassidy's office.

Q. Just a moment, before you come to that interview. Wasn't there some talk between Munnell, or Sherrill and yourself, or perhaps both of them and yourself, with reference to their stock of merchandise?

A. There was.

Q. Lets have that conversation first. Who brought that up and what was said in that respect?

A. Well I brought the matter up myself in regard to their stock.

Q. What was said?

A. And it was suggested that if this deal with Cassidy went through, Cassidy would relieve them of some of the stock, which was naturally supposed to be saleable stock, stock that he could sell. So they said that was perfectly agreeable to them.

Mr. LILJEQVIST: I move to strike out that naturally supposed. Tell the conversation with them, not the conclusions.

Q. Just state what was said, not what was supposed. Was there anything said with respect to the kind of stock that was to be turned over to Cassidy?

A. Well there was no particular stock specified.

Q. Had you spoken to Cassidy prior to that, as

(Testimony of W. G. Fitzgerald.)

to what stock—whether he would take any stock from Munnell & Sherrill?

A. I had.

Q. And if so, what kind?

A. I had. He immediately wanted stock.

Q. Well did you have any talk with Munnell & Sherrill—did you have any conversation with Munnell & Sherrill regarding the character of the stock that was to be turned over to Cassidy?

A. No.

Q. Now the next interview you had was when Munnell & Sherrill and yourself and Cassidy spoke about the matter at his place of business?

A. Yes.

Q. And was there anything said then with respect to the character of the stock that was to be turned over, in the presence of all of you?

A. There was.

Q. Now state what was said and who said it.

A. The list was submitted. I don't know—I presume it was that particular list. Mr. Cassidy looked it over and he said, "Why there is a lot of old stuff on here that I couldn't use." He says, "What I want," he says, "is current merchandise, that is, popular stuff."

Q. And did he indicate on the list some that he couldn't use?

A. No, he just looked it over. They might have remarked about one or two items, I don't recall that.

(Testimony of W. G. Fitzgerald.)

Q. And was there any designation at that time, or definite instructions given as to what particular styles, sizes or quantity was to be shipped or turned over by Munnell & Sherrill to Cassidy?

A. There was not.

Q. That is the way that matter was left when that interview terminated?

A. Yes, sir.

Q. Now who was it that suggested the matter of putting your agreement in writing?

A. Either Mr. Sherrill or Mr. Munnell, one or the other.

Q. What did he say in that respect?

A. After it was agreed that Mr. Cassidy was to take on our line, and he was to draw on their stock until he got his factory supply of tires, either Mr. Sherrill or Mr. Munnell said that before they would turn over any stock to Mr. Cassidy they must have a letter from me authorizing them to do that.

Q. And did you tell them you would give them such a letter?

A. I did.

Q. And you sent them this letter of September 18, 1921?

A. I did.

Q. Where did you—did you prepare it and give it to them right then and there, or later?

A. No sir, I was stopping at the Multnomah Hotel, and I went over to the hotel and wrote the letter myself on my own typewriter.

(Testimony of W. G. Fitzgerald.)

Q. Did you deliver it to them or mail it to them?

A. I mailed it to them because I was leaving that night.

Q. You left town on the 18th?

A. Yes.

Q. So I take it you were not here when Munnell & Sherrill delivered the merchandise to Cassidy?

A. I was not.

Q. And you don't know—you didn't know what particular character of merchandise was to be or would be turned over?

A. No, sir, I did not.

Q. Now what was the next thing you heard about any tires—about these tires?

A. Well after I left Portland I believe that I went back to San Francisco immediately, and the first I heard of this stock transfer was our shipping clerk came to our office one morning and told me he had been informed by a drayman that there was a great big bunch of tires on the San Francisco dock consigned to us; so I went down and looked them over, and I found there about 340 or 350 tires, something like that, in a terrible condition, dirty, paper torn off of them, all of this obsolete stuff that Munnell & Sherrill had. So I immediately got in touch with Munnell & Sherrill and inquired why they had sent these goods back to us.

Q. You thought they had shipped them?

(Testimony of W. G. Fitzgerald.)

A. I presumed they had. I didn't know where they had come from. So they replied to my letter or my wire, stating that these goods had been turned over to the Cassidy Tire Company, and the shipment was from Cassidy. Just about that time we got notification from the Cassidy Tire Company that he had shipped a whole bunch of stuff back to us that had been turned over to him by Munnell & Sherrill that he couldn't use.

Q. Now in your conversation with Munnell & Sherrill, and with Cassidy, was there anything said at all with respect to the plaintiff taking back any tires from Munnell & Sherrill?

A. Repeat that question.

Q. Was there anything said at that time with respect to plaintiff, that is, the Mohawk Company?

A. Yes.

Q. Taking back any part of Munnell & Sherrill's stock?

A. There was not.

Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy, if he would accept the whole or any part of the merchandise?

A. Correct.

Q. It wasn't contemplated that the Mohawk Company would take back any of that merchandise?

A. No, that merchandise was of no benefit to us; no use to us.

(Testimony of W. G. Fitzgerald.)

Q. Had you been authorized by the Mohawk Company to make any arrangement which would result in these tires coming back to them?

A. I had not.

Cross Examination.

Questions by Mr. Liljeqvist:

Now Mr. Fitzgerald, how long prior to September 18, 1921, had you been Pacific Coast Manager?

A. Since May 1919.

Q. Since May 1919?

A. Yes.

Q. You say you had no instructions in writing?

A. What kind of instructions?

Q. Instructions from your factory?

A. No, sir.

Q. And as far as any persons dealing with you were concerned, they wouldn't know when they dealt with you, as to whether you were acting within or without the scope of your authority, unless you told them?

A. Well I don't know whether they would or not. I generally tell people just how far—I tell my customers just how far my authority extends.

Q. In other words, when you don't do a thing you tell them you will have to take it up with the factory?

A. That is true.

Q. And if you do do a thing, or consummate a certain transaction with them, you don't tell them

(Testimony of W. G. Fitzgerald.)

that you are doing something that you didn't have authority to do, do you?

A. Whenever I consummate a transaction with a customer, fully consummate it, it was not necessary for me to tell that.

Q. In other words, the things that you did—

A. I was within my authority.

Q. The contracts you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn't you?

A. I did.

Q. So whatever the agreement was that you made on December 2, 1920, when these notes were given and the tires shipped back, whatever that agreement was, that was in the scope of your authority, wasn't it?

A. It was not.

Q. It was not.

A. It was not.

Q. Did you do something at that time you had no authority to do?

A. I had no authority to carry out this note transaction without first taking it up with my factory.

Q. What I am asking you is, whatever you did do at that time you had authority to do, didn't you?

A. I did.

Q. There is simply a dispute between us as to what you really did?

(Testimony of W. G. Fitzgerald.)

A. That is, as far as instructing Munnell & Sherrill regarding these notes.

Q. Now you had some authority before you came up here and consummated the deal, didn't you?

A. Well my company instructed me to come up here and endeavor to effect settlement.

Q. Where are those instructions, where your company authorized you to come up here and effect settlement?

A. You have it. You have a telegram here; you showed it to me the other day. Where is it? You have it.

Q. In accordance with certain letters. You said you didn't have those letters.

A. I haven't any letters, no.

Q. Your company authorized you to come here and effect a settlement, didn't they?

A. That settlement.

Q. A settlement?

A. That settlement.

Q. What settlement?

A. The settlement they are talking about, pertaining to those notes, and that \$6500 worth of merchandise.

Q.. Did that authority come in writing?

A. I don't recall whether that did or not. The authorization is in that telegram you presented here.

(Testimony of W. G. Fitzgerald.)

Q. No it isn't. The telegram refers to some letters they sent, or you sent them.

A. There was considerable correspondence about the matter of that \$6500 worth of tires which Munnell & Sherrill wished to return.

Q. Now wire was sent by your company to you, "Munnell & Sherrill make complete settlement along lines your letters nineteenth have all tires returned San Francisco branch get notes for balance including interest since due seven per cent." Where is your letter stating what kind of a settlement you made? You haven't produced it here.

A. I haven't it.

Q. You haven't got it here?

A. I don't think was instructed. I could have got it.

Q. You knew was a law suit on here, and there was a dispute between us with reference to what you did do, and what you agreed to do?

A. Well I did what I agreed to do, didn't I? I accepted this \$6500 worth of merchandise and their five notes.

Q. And you agreed with Munnell & Sherrill that the stock which they didn't ship back they could keep here, and that you would give them protection on it, unless the trade price commission prohibited you from doing it. Isn't that true?

A. I did not.

Q. What?

(Testimony of W. G. Fitzgerald.)

A. There was no specific agreement along that line.

Q. You did talk over the proposition of whether you would give them an agreement, didn't you? Protection on these goods that they kept?

A. I did, yes.

Q. And you told them that you were willing to give them that agreement unless the Federal Price Commission or Trade Commission—whatever you call it—entered a ruling making such an agreement unlawful, or words of like effect and meaning, didn't you?

A. The matter came up, Mr. Liljeqvist, if you will allow me to answer this in my own way—the matter came up here yesterday about this case, referring to Spring dating purchases, when these notes were given, and something was said about price protection being the usual thing on Spring dating goods. Now I had no authority to tell Munneil & Sherrill or neither did I tell them, that when they gave me those notes, or sent those notes into our factory, that these goods would just automatically revert in their purchase, don't you see, on the Spring dating terms. I didn't tell them that. I couldn't have told them that.

Q. You understood that they were going to have the right to take these same goods that they kept and sell them to dealers on Spring dating terms, didn't you?

(Testimony of W. G. Fitzgerald.)

A. I didn't know how they were going to sell them to their dealers.

Q. You didn't know how they were?

A. No; whether Spring dating terms or whether current.

Q. What were you taking up in reference to their getting other terms, unless the Federal Trade Commission otherwise ordered?

A. They brought that matter up.

Q. But you agreed that unless the Federal Trade Commission otherwise ordered, that they should have them upon those terms?

A. I did not.

Q. Sure of that?

A. I am sure of it.

Q. You heard their testimony that you did?

A. I heard it.

Q. But you haven't the letter written by you to your factory showing the terms upon which you did make that settlement, have you, here?

A. No, I haven't.

Q. Your telegram shows you did send a letter showing the factory the terms of the settlement

A. That letter was sent from my office in San Francisco.

Q. You have copies of all your correspondence except that?

A. No, I don't think the correspondence is complete.

(Testimony of W. G. Fitzgerald.)

Q. Now next following, the May price reduction took place, didn't it?

A. Yes.

Q. And you came up here in June, didn't you?

A. Yes.

Q. And they talked to you about the rebates?

A. Yes.

Q. They sent you a list of all tires upon which they claimed they should have a rebate, and which they claimed was pursuant to your agreement, at the time you made the note settlement?

A. They sent up quite a list of tires but they didn't claim rebate on everything that was contained on that list.

Q. They claimed rebate in accordance with your agreement, the agreement they claimed you made in December, when they gave the notes?

A. Yes, sir.

Q. And you had a conference between you, and you told them it would amount to between \$3500.00 and \$4000.00 to make that rebate?

A. Yes, glancing at the list I would surmise that.

Q. And it was stated by you at that time that a fair amount of rebate under the circumstances would be the amount of one of these notes?

A. I said if you are able to get rebate on those tires, I should think it would amount to about the equivalent of a note.

Q. You didn't tell them at that time they were-

(Testimony of W. G. Fitzgerald.)

n't going to get any rebate, or that they weren't entitled to a rebate, did you?

A. I did not.

Q. Did you tell them if they did get a rebate it shouldn't amount to more than the equivalent of that note?

A. I thought it would amount to about that.

Q. But you understood they claimed at that time that you had made an agreement for a rebate when they kept the goods back there in December, and they gave the notes, didn't you?

A. Repeat that question please.

Q. You understood at that time, at that conversation, that they claimed they had an agreement with you that they should get a rebate upon the goods which they had retained at the time they made the note settlement?

A. Well there was nothing ever definitely done about—that is there were no definite promises given these gentlemen they were going to get a price reduction. It was just general assumptions.

Q. It was just general assumption they would get it?

A. On their part, yes.

Q. And on your part?

A. Not altogether.

Q. What you said to them led them to understand that at the time they signed these notes and made this settlement, that they would get that pro-

(Testimony of W. G. Fitzgerald.)

ection unless the Federal Trade Commission otherwise ordered?

A. I did not.

Q. Sure of that? Well later on, you testified in your direct examination, that when they took the matter up with you again you again suggested that they should hold out one of the notes until they should get the rebates they were entitled to. I kept your exact language. I kept your exact language. That is what you testified to, didn't you?

A. I will tell you about that, Mr. Liljeqvist.

Q. Hold on, you can explain afterwards. You testified to that?

A. I did.

Q. Later on you told them they should hold out one of these notes until they got the rebate they were entitled to? That is what you testified, in those words, didn't you?

A. I said that—

Q. Answer the question first, then you can explain.

A. What was the question again?

Q. I say you testified on direct examination that you told Munnell & Sherrill some time in December, 1921, that they should hold out one of these notes until they should get the rebate they were entitled to. Didn't you?

A. That is correct.

Q. And they were entitled to a rebate?

(Testimony of W. G. Fitzgerald.)

A. To the extent of about \$500 I think.

Q. To the extent of \$2633 and some cents, the amount of that note?

A. That statement shows that they got the rebate they were entitled to, ultimately.

Q. But you told them to hold out that note?

A. Until they got it. And they got it.

Q. And we are holding out that note until we get that rebate through the verdict of this jury.

Mr. BISCHOFF: That is side play.

Q. Didn't you tell them absolutely at that time that they were entitled to that rebate and they should hold out that note?

A. I did not, Mr. Liljeqvist.

Q. Didn't you before that time tell them that you would issue a credit memorandum for the amount of the rebate represented by this stock that they kept on hand in December due to the price decline of May 10, 1921?

A. They got those credits, the statement shows that.

Q. How did you arrive at the amount you claim they were entitled to?

A. I arrived at the amount—or I didn't arrive at it myself, we have an office force that does those things—we took that list they sent to us and went through the serials and we segregated those tires from the list that had been purchased sixty days prior to the decline, and it was on those tires that

(Testimony of W. G. Fitzgerald.)

they got the rebate, the tires that they purchased sixty days prior to the decline.

Q. When was that done?

A. A long time afterwards.

Q. You gave them that credit in 1922?

A. When?

Q. 1922.

A. I think you are mistaken there.

Mr. BISCHOFF: Nothing of the kind, that credit memorandum is in evidence.

Mr. LILJEQVIST: Why make such a statement. Let the jury settle it.

Mr. BISCHOFF: You know it. Don't misstate it.

Q. Didn't you issue your credit—part of the credit they claim they are entitled to, in 1922, on account of the May 10th settlement?

A. I don't recall. If you will let me glance at that statement I can tell you pretty quick.

Q. You didn't take any inventory when you were up here, did you?

A. I didn't have to.

Q. In June, 1921?

A. In 1921?

Q. Yes.

A. At the time, you mean, of the price decline?

Q. Yes, after the price decline.

A. No, I didn't take an inventory; they had it sent on to us.

Q. You didn't in any of these conferences that

(Testimony of W. G. Fitzgerald.)

you had with them, indicate that they were not entitled to a rebate by reason of the May 10th decline, on the goods they kept in December?

A. I don't remember that.

Q. As far as you were concerned, when you were here you agreed with them that they had a claim, a just claim there, and that they would get the matter straightened up, but later on the company refused to carry this agreement into effect. Isn't that the situation?

A. No, sir.

Q. That isn't it?

A. No.

Q. They wrote a number of letters, one in August, asking for credit on this stock by reason of the May 10th decline, didn't they?

A. Have you their letter there?

Q. It has been offered in evidence. You never answered that letter, did you?

A. I don't know. I presume I did answer it. I am in the habit of answering my correspondence.

Q. In other words, when you came up here and talked to these gentlemen you promised them certain things, and when you got back to San Francisco you refused to put those promises in writing, didn't you? Isn't that a fact?

A. It is not.

Q. You say you didn't have any right or any power back there in December, to make an agree-

(Testimony of W. G. Fitzgerald.)

ment to guarantee Munnell & Sherrill against a price decline?

A. I have not.

Q. Isn't it a fact that you did make an agreement of that kind shortly after?

A. No, sir.

Q. In January, 1921?

A. I did not.

Q. Didn't you on January 17, 1921, or about that time, make an agreement with the Tire Service House of Seattle, Washington, in which you said in words to the effect, "in the authority invested in me as Pacific Coast Manager of the Mohawk Rubber Company, I accept the above order on the terms and agreements mentioned therein." And you added, "full price protection in advent of decline, same to apply on stock in your hands, or your dealers."

A. On that particular order I know why I did that, and there is a reason for it. It was one order, one particular order.

Q. It was the whole stock on hand?

A. It was the whole stock on hand which covered some Giant pneumatic tires they were holding up there for a special purpose.

Q. Shortly after January 17, 1921, you did give a full price protection to the Tire Service House of Seattle, didn't you?

A. I did, with the authority of my company on that particular order.

(Testimony of W. G. Fitzgerald.)

Q. You had the same authority when you made this settlement you had on that of Munnell & Sherrill, didn't you?

A. I did not.

Q. And you haven't your letter here that you wrote to them showing that you didn't make that kind of an agreement, have you?

A. I have not.

Q. In that agreement you made with the Tire Service Company you said, didn't you, We beg to advise that in the event of price decline you will be rebated to the extent of your stock; that is, you would be given a credit for the differential in what you paid for the tires, and the basis of your cost under the new schedule?

A. On that particular order.

Q. That is the same kind of an agreement you made within a month prior to that time, with Munnell & Sherrill. Isn't that true?

A. These people are not regular people with the Mohawk Rubber Company, and they were buying these tires for a particular purpose. We were to send a man up there to help them with this proposition that they were going to put over; at the time this order was taken I didn't know when I could get that man up there, whether it would be two months, three months or four months. Tires were on a decline at that time, and I wired my company for permission to give these people that

(Testimony of W. G. Fitzgerald.)

particular protection on that particular order, and they got it.

Q. You gave them on that order?

A. On that order.

Q. And you say you didn't give it to Munnell & Sherrill on what they had?

A. I did not.

Q. Now didn't you on January 12, 1921, or about that time, make a contract with the Knott-Atwater Company?

A. I did.

Q. At Spokane, Washington?

A. I did.

Q. On which you gave them unlimited price protection?

A. On that particular order. One order, which was to be shipped into Montana.

Q. There were two firms to which you gave full price protection, didn't you?

A. I did, on two orders.

Q. And you didn't give to Munnell & Sherrill, you claim?

A. I did not.

Q. How do you expect Munnell & Sherrill to sell these tires, go out and sell them on Spring dating orders, and make a contract protecting the dealers, unless they had protection against a decline?

A. On this Munnell & Sherrill proposition was a difference thing altogether than these two mat-

(Testimony of W. G. Fitzgerald.)

ters which you have just brought up. Munnell & Sherrill were an established distributor of the Mohawk Rubber Company. They knew exactly what our terms were; they knew what every other distributor's terms were, that bought automobile tires. If I came up here and sold Munnell & Sherrill one order for a special service, the chances are they would have gotten the same agreement which you see on these two letters you have in your possession.

Q. As a matter of fact, Munnell & Sherrill were a great deal bigger dealer than these people, and were entitled a great deal more to this kind of protection than these men were, as a matter of fact?

A. No they were not. Munnell & Sherrill were not entitled to unlimited price protection on \$15,000 or \$20,000 worth of tires to be held an indefinite length of time.

Q. You know if you had not given that agreement they would have shipped the entire bunch of tires to you at San Francisco?

A. No they wouldn't; they couldn't have shipped them back. They might have shipped them back, but no reason we would accept them.

Q. You had an understanding you would take them back before that time?

A. I did not, sir.

Q. You did not?

A. I did not.

(Testimony of W. G. Fitzgerald.)

Q. It wasn't their fault they had this back stock?

A. It wasn't?

Q. Later on when this Cassidy deal came up, who took that matter up? How did that matter first come to your attention?

A. What matter?

Q. That resulted in Cassidy deal.

A. Mr. Cassidy, as I mentioned a few minutes ago, was in San Francisco, and dropped into my office and told me he was very much dissatisfied with the line of tires he had at present—at that time. He wanted to know how Munnell & Sherrill's account was progressing, and I told him it was not as large as we would—they were not furnishing us with the volume of business that we would like to get out of Portland. So he says, "Well if you ever see fit to make a change up there," he says, "let me hear from you, and possibly we can get together."

Q. So then the proposition that resulted in the change really came from the desire of Cassidy to handle your line, didn't it? It was initiated in that way?

A. Yes.

Q. And ultimately resulted in the transaction which is involved in this suit?

A. I don't know as it did.

Q. When you came up here to Portland you talked with Cassidy, didn't you?

(Testimony of W. G. Fitzgerald.)

A. I did.

Q. And the result of that was a transaction occurred in which a lot of tires were turned over to Cassidy which is the subject of this dispute?

A. Yes, sir.

Q. And you gave a written letter of instructions, which there is no dispute about. Your instructions there?

A. But you will note that letter there mentions specifically—

Q. You had authority to write that letter of instructions, didn't you?

A. I did.

Q. As a matter of fact, your letter that has been offered in evidence by your counsel here, states that you had authority to make territorial arrangements, doesn't it?

A. True.

Q. And other things, it says. Now what are the other things you had authority to do?

A. Well I have authority to make—to sell merchandise, to make territorial arrangements, to hire salesmen, and to conduct the selling end of our business.

Q. And in making territorial arrangements naturally you, way out here on the Pacific Coast, and the company way back East, they leave things incident to consummating the deal for territorial arrangements, to your judgment, don't they?

(Testimony of W. G. Fitzgerald.)

A. Largely.

Q. And in making the territorial arrangement, and the transfer of this Mohawk line to Cassidy, you had authority for Munnell & Sherrill to turn over their entire stock to Cassidy, if you should make that agreement, didn't you?

A. If I had seen fit, yes.

Q. You had a right to do that, and you don't deny that was within the scope of your authority?

A. No.

Q. You are simply now claiming that they didn't have any right to turn these tires over?

A. Just matter of—

Mr. BISCHOFF: Just a moment. I object to that, may it please the Court. Our contention has been all along that the plaintiff could not be bound by any assumption of authority upon the part of any agent, especially where he was acting with knowledge of certain limitations.

COURT: This goes to Mr. Fitzgerald's understanding of his authority.

A. Just a matter of re-selling stock of merchandise, provided Cassidy would have accepted these goods they had turned over to him.

Q. What I am asking you is this: It was within the scope of your authority, as a matter of fact, was it not, to have had Munnell & Sherrill, in consideration of cleaning up their business and turning it over to a new distributor, turn their entire stock over to Cassidy?

(Testimony of W. G. Fitzgerald.)

A. Provided Cassidy would have accepted it.

Q. No. I say that is within the scope of your authority?

A. I say provided Cassidy had accepted it.

Q. But Cassidy testifies he did accept it, didn't he?

A. He did not. I don't think.

Q. He did not?

A. No, he didn't accept.

Q. As a matter of fact Cassidy did accept these tires, didn't he?

A. No, he did not.

Q. As a matter of fact you had an agreement with Cassidy, didn't you, that he should take over these tires, and what he didn't sell or dispose of he should ship back to San Francisco, and you would give an extra discount?

A. I did.

Q. You did have an agreement of that kind? Didn't you have an agreement with Cassidy that he should take these tires, and what he didn't sell or want he could ship back to San Francisco?

A. It was agreed that Mr. Cassidy was going to accept from Munnell & Sherrill Company only merchandise that was popular, and what I might say, current merchandise. Mr. Cassidy—anybody that knows him very well will bear me out in the fact that he is a stickler for new merchandise, and he was so afraid that he was going to get some old

(Testimony of W. G. Fitzgerald.)

merchandise, even in these popular sizes and saleable sizes, from Munnell & Sherrill, that I told him that if he had a few of them left over and he was afraid of them, that he could send them back.

Q. As a matter of fact you went over this list and you found some sizes there he might not be able to dispose of? You told him that was all right, if you don't sell them send them back to San Francisco, or words to that effect?

A. I did not.

Q. You heard his testimony?

A. I did.

Q. Wasn't that testimony true?

Mr. BISCHOFF: That is for the jury.

A. I don't recall his exact testimony.

Q. As a matter of fact, you testified on direct examination you did not know the particular kind or character of merchandise that was to be turned over by Munnell & Sherrill to Cassidy, and it wasn't agreed, the particular kind or character, and wasn't limited, was it?

A. Well it was mentioned, that the merchandise of course would be saleable popular stuff.

Q. Where was that mentioned?

A. That was mentioned to Mr. Cassidy, and I think it was mentioned also that Sunday morning with Mr. Sherrill and Mr. Munnell, and Mr. Cassidy and myself, when we were holding our conference. Munnell & Sherrill in writing or otherwise, that they

Q. As a matter of fact you didn't instruct Mun-

(Testimony of W. G. Fitzgerald.)

were limited in the quantity of tires which they could turn over to Cassidy?

A. I think my letter simply states it was merchandise that will be acceptable to Mr. Cassidy and also themselves, that is, sizes and quantities.

Q. Didn't you testify on direct examination that you had no conversation with Munnell & Sherrill as to the character of the stock to be turned over to Cassidy?

A. Repeat that question, please.

Q. Didn't you testify on your direct examination that you had no conversation with Munnell & Sherrill as to the character of the stock to be turned over to Cassidy?

A. Well there was nothing said to Munnell & Sherrill as to any particular size or style of tire that they were to turn over to Cassidy.

Q. They were not forbidden to turn over any of that stock to Cassidy, were they?

A. No.

Q. You didn't tell them that some of this, certain stock here, you can turn over to Cassidy, and keep the balance; the remainder you must keep yourself, did you?

A. No.

Q. You didn't say that. You didn't say: You turn over to Cassidy half a dozen of this size and a dozen of this size, and four of five of this size, or anything of that kind, did you?

A. No.

(Testimony of W. G. Fitzgerald.)

Q. You didn't limit it in any respect in that way, did you?

A. No.

Q. The quality or characted or quantity wasn't limited in any conversation you had with Munnell & Sherrill?

A. No.

Q. Now isn't it true, Mr. Fitzgerald, that in December when you made this agreement, you felt that under the circumstances of the tire business as it had been that year, and the experience that Munnell & Sherrill had had up here in handling your line, that you had the right, in behalf of the factory, when you did give them price protection in case of a decline?

A. Didn't I think I was doing right in behalf of the factory, to give that price protection?

Q. Yes.

A. I didn't give that price protection.

Q. You didn't do that?

A. I did not.

Q. But in the following year when you came back here they talked over with you about these rebates, when you talked about this note; instead of making it \$3500 or \$4000 didn't you consider you were doing the right thing on behalf of the factory, giving them rebate to that extent, and that is the reason you did give it to them?

A. I didn't give it to them.

Q. You did not?

(Testimony of W. G. Fitzgerald.)

A. I did not.

Q. Now you don't deny, do you, that you went up on the second story, the second floor in the wholesale business of Munnell & Sherrill, and went over that stock?

A. As I mentioned early this morning, I am not sure about that, I wouldn't care to commit myself.

Q. This sheet here, pink sheet, that has been offered in evidence, is in your handwriting, isn't it, the pen?

A. Yes, sir, that is my handwriting, yes.

Q. Don't you remember going out through the warehouse, through the store there, the wholesale store, and going over these tires, and marking them down on some tags, and coming back later on and writing this out from the tags you made?

A. Munnell & Sherrill, you know carry their stock on two floors; it is in three establishments, their retail store, and the first and second floor of their wholesale store. I am under the impression that Sherrill and myself just went over the stock on the first floor, which is the stock that they carry down there for current requirements, but it is possible that we went on the second floor also. I am not sure about that.

Q. They claim that you did, but you now deny it, do you?

A. I won't deny that.

Q. Simply a question of an old transaction. It is easy to forget some things, isn't it?

A. Why certainly.

(Testimony of W. G. Fitzgerald.)

Q. Now, do you remember whether you made any inventory on little cards, little tabs, and later on came in and wrote this down from these tabs?

A. Yes, sir.

Q. You remember at least doing that?

A. Yes, but as I mentioned, I think that part of that list was taken from their card system which they had in the office.

Q. You think so?

A. I think so.

Q. But you are not sure of that; just your impression?

A. No, I am not sure.

Q. Now, to the left of this list where your handwriting appears, are some pencil notes of "2," "2," "2." Do you remember when these were made?

A. No, I do not.

Q. You don't remember whether at that time it was made, or at the conference down there at Cassidy's, when they marked those numbers down there, the amount that they would keep out for their own store?

A. I really don't know what those figures indicate.

Redirect Examination.

Questions by Mr. Bischoff:

I want to call your attention to these two orders, this Seattle order and this Spokane order.

A. Yes.

Q. At the time that you gave them this protec-

(Testimony of W. G. Fitzgerald.)

tion against decline in prices, was that upon stock that they had had in their possession for a year or more, like Munnell & Sherrill, or was it upon an order placed at that time?

A. It was one particular order they were placing at that time.

Q. And that was in effect a dating order, merchandise to be shipped on that order in the future and to be protected against decline?

A. For that one particular order.

Q. But it was not the merchandise which these people had on their hands for a year or more, like Munnell & Sherrill?

A. They didn't have any, Mr. Bischoff, because they were not real customers of ours; they simply bought two bills which each of these customers paid—one bill from each of the customers.

Q. In other words, if Munnell & Sherrill had placed an order with you, say in December or January, for new merchandise, they would have gotten an agreement for price reduction in accordance with letter which you gave them?

A. Absolutely.

Q. Which they have?

A. Absolutely.

Recross Examination.

Questions by Mr. Liljeqvist:

Did your company attempt to repudiate that agreement, or attempt to have a lawsuit against this very agreement in Seattle?

(Testimony of W. G. Fitzgerald.)

Mr. BISCHOFF: Objected to as incompetent.

COURT: I don't think that is competent.

Witness excused.

Plaintiff rests.

Defendant rests.

Mr. BISCHOFF: I wish to submit a motion for a directed verdict at this time.

At this time the plaintiff moves for direction of a verdict in its favor on the ground that it has established a prima facie case, and that no issue had been raised by the evidence with respect to any material allegation of the complaint; on the ground that the defendant has failed to establish by competent evidence any of the defenses set forth in their answer. In this connection I wish to call the attention of the Court to the pleadings upon which the defendants are here, first to the small item of \$249.00 which they claim. All the allegations in the pleadings are contained in one paragraph, that is, it is repeated two or three times, but all in the same language.

Now, with respect to the third defense, the third note is attempted to be alleged in this third defense, irrespective of the other items, and they say that note is discharged by the agreement made in June. That agreement is to be found in the 8th paragraph of that third defense. Now, in the last analysis, this is an attempt to set forth what we might term an account stated, attempting to indicate that there was a difference as to the amount of the indebted-

ness, which had been computed, and that they had agreed upon an amount and had agreed as to the payment thereof and as to the manner of payment, and we submit that the evidence falls short of establishing that defense for several reasons:

COURT: I think his authority is a question for the jury. Mr. Fitzgerald testified that he had authority to make any contract that he did make.

Mr. BISCHOFF: An agent can't bind his principal by assumption of authority. I have authority of the Supreme Court of the United States—

COURT: You need not take up the time of the Court on that question.

Mr. BISCHOFF: If the Court has made up its mind on that question I will pass to the one with respect to the \$9800.00 credit which they claim and on which we ask for a directed verdict in favor of the plaintiff, on the ground that there is failure of proof of the defense set forth in the answer, in other words they fail to establish the contract set up in the answer but attempt to establish a contract of a different character. Their allegation is that they made a definite and unconditional agreement with plaintiff that plaintiff would take back all the stock that Munnell & Sherrill had on hand.

COURT: It seems to me the questions in this case are for the jury. So far as the pleadings are concerned you made no objection to the form of the pleadings until after the evidence was all in, and all the presumptions are in favor of its validity and the sufficiency of the pleadings as far as the \$249.00

is concerned; while it is not as definite and certain as it ought to have been made and might have been made if the objection had been made earlier, it is too late now to do that because all the presumptions are in favor of its sufficiency.

Now, the theory of the defense, as I recall the testimony, is based upon the list sent to them by the plaintiff, and upon which the plaintiff makes its own estimate of \$110.68, so there is no controversy about the particular tires that are involved. It wasn't necessary for the defendant to go any further and make any additional proof because the plaintiff had, by its own statement, admitted that it received these tires and that the defendants were entitled to a rebate upon these particular tires, and it is only a question as to the amount of the rebate, and there has been some testimony in reference to that.

Now, as far as the third defense is concerned, it is simply a question of an agreement—whether there was an agreement between these people, a valid agreement, in settlement of that disput or whatever it was concerning the rebate—that it should be adjusted by the cancellation of one of the notes. Now, whether Mr. Fitzgerald had authority to make that kind of a contract is I think, under the evidence in this case, a question for the jury.

The other matter, I think, is fully covered by the pleading, at least the testimony is within the allegations of the answer as it now stands, and for these reasons the motion will be overruled. The

jury should understand, however, that all these questions of fact are to be determined by them, and they are not to be influenced in any way by the overruling of the motion for a directed verdict.

Mr. BISCHOFF: Save an exception.

Mr. LILJEQVIST: I wish to interline in paragraph II, 6th line, on page 15, the words "remaining unpaid" and insert after the words "plaintiff herein."

And that the word "second," fifth line, 11th paragraph, page 10 be changed to read "first."

Mr. BISCHOFF: I object to an amendment that will have any effect upon the pending issue as to what additional credits they are entitled to.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
Mohawk Rubber Company, Plaintiff,

vs.

Munnell & Sherrill, Defendants.

Instructions

(R. S. Bean)

Portland, Oregon, June 20, 1923.

Gentlemen of the Jury:

Now, Gentlemen, this case is somewhat complicated, and I shall try to state to you as clearly as I can the issues you are to try. The action is brought by the Mohawk Rubber Company, the plaintiff, against Munnell & Sherrill to recover on three promissory notes executed by the defendants on the second of December, 1920, and due, one on

February 10, 1921, one on April 10, 1921, and the third on May 10, 1921, and in addition to recover a balance alleged to be due on open account. It is charged in the complaint that between the 8th of November, 1920, and the 9th of November, 1921, plaintiff sold and delivered to the defendant on open account goods, wares and merchandise of the value of \$11,739.75. This allegation is admitted; so that it is admitted by the answer and by the defendants in this case that they made, executed and delivered the three notes set up in the complaint as alleged; and that in addition to that they purchased from the plaintiff between November, 1920, and November, 1921, \$11,739.75 worth of goods, wares and merchandise.

Now, the complaint sets up that these notes and no part of them have been paid, and that there is now due and owing on the three notes the amount of the face thereof with interest from date to the present time at the rate of seven per cent per annum, and that in addition the note provides for the payment of a reasonable attorney's fee in case of suit or action there, and the plaintiff is claiming, in addition to the face of the notes and interest, reasonable attorney's fee for the prosecution of this action. That reasonable fee I believe is alleged to be \$250.00 on each note of \$750.00.

There is a question as to the amount of the credit the defendant is entitled to on the open account. The plaintiff says they are entitled to a

credit of \$5006.74, leaving a balance due on the open account of \$6733.01, but as I understand the evidence as given on the trial, it appears that the defendants are entitled to a credit in addition to the \$5000 admitted in the complaint. The amount of that you can ascertain from the itemized bill that is attached to one of the depositions in this case, keeping in mind, however, in doing that, that it contains items which are not properly to be credited on this particular account, because they were for matters that occurred, some of them, prior to the settlement of December, 1920, some six thousand dollars or more for tires that were returned. You will recall that the evidence shows that at the time these notes were given there was an agreement that defendant should return to plaintiff certain tires and receive credit for them, and in pursuance of that agreement defendant did send to San Francisco some tires of the value of six or seven thousand dollars and received credit. So, as I understand it—and you are not bound by my understanding unless it conforms to your own conclusions after you have examined the evidence—the defendant is entitled on the open account to a credit of \$3011.11 in addition to the \$5006.74 or a total credit of \$8017.85, leaving a balance due plaintiff on the open account of \$3511.90.

Now the defendants make in substance two defenses to this action: First, they say that the third note, or the note referred to in the third cause of

action, the note due May 10, 1921, was settled and discharged by an agreement between them and the representative of the plaintiff, made in June, 1921. Their contention, as I understand the testimony, is that at the time the notes were given in December, 1920, it was agreed between them and the representative of the plaintiff that the defendants should have an unlimited protection against price decline on all tires that they might have on hand at the time the reduction in price went into effect, and that that reduction went into effect in May, 1921. And that thereafter, and in June of that year, they had an understanding and agreement with a representative of the defendant company by which, in settlement of their claim for a rebate on these tires because of the decline in price, it was agreed and understood between the parties that the third note set out in the complaint should be cancelled and surrendered by the plaintiff, and they set up that as a defense against that particular note.

Now, referring to that question and to that note, the only defense interposed against it is that the plaintiff and the defendants entered into an agreement that it was to be discharged by giving this credit for rebates on the stock of merchandise which they had on hand, due to reduction in price of tires which was announced on or about May 10, 1921.

The claim for \$249.11, to which I will call your attention later and the claim for some \$98000 for tires turned over by the defendant to what we may

refer to for convenience as Cassidy, have nothing to do with the defense to this third cause of action. The only thing you are to consider in determining whether the plaintiff is entitled to recover on this note is whether or not the agreement was made as defendants contend for. The burden of proof in this respect is on the defendants and before they are entitled to a verdict on this defense they must satisfy you by a preponderance of the evidence that the plaintiff did agree to discharge that note in liquidation of all rebates that the defendants might have been entitled to by reason of the May decline in prices. In order to find that such an agreement took place, it is necessary for the defendants to establish first: That they were in fact entitled to a rebate for the decline in prices; second, that the plaintiff, through Mr. Fitzgerald, agreed to compromise the claim by cancelling the third note; and third, that Fitzgerald had authority to make such an agreement on behalf of the plaintiff. If these three elements are not all present that agreement is not established and the plaintiff is entitled to a verdict upon the note irrespective of your determination in respect to the first, second and fourth causes of action.

Now the plaintiff, or a party is not bound by promises or agreements made by one assuming to be an agent unless he has authority to represent his principal, so that in this case the plaintiff would not be bound by any agreement or promises made

by Fitzgerald unless you find that he had authority, to make such promises or agreement. Now, an agent's authority may be either expressed or implied. It may be expressed when it is contained in some written instrument that shows his exact authority. It may be implied from the course of dealing, and from the holding out, as we say, and as to third parties the principal is bound by the acts of his agent not only when exercised in pursuance of actual authority but also within the scope of his apparent authority arising from the manner in which his principal has held him out to the public in the absence of knowledge or information to the contrary. This authority of an agent to bind his principal in contracts made with third parties is measured not only by the agent's express obligation or authority, but also by that which he is held out by his principal as possessing, providing however, that the third party has reason to believe and did believe that the agent was acting within and not exceeding his authority. But it is equally well settled that one who deals with an agent knowing that he is clothed with a circumscribed authority and that his act transcends his authority cannot hold his principal, and this is true whether the agent is general or special, for a principal may limit the authority of one as well as the other. So that, while Mr. Fitzgerald was the Pacific Coast Manager of the plaintiff, and while parties dealing with him without any knowledge of the limitation on his authority had a right to assume that he possessed

the authority usually exercised by persons occupying such positions, and if they did do relying on his apparent authority, his acts would be binding upon his principal. But if, in dealing with Fitzgerald, these defendants knew that he was exceeding his authority or that he had no authority to make the particular contract alleged to have been made, then such agreement would not be binding upon the plaintiff for one dealing with an agent whose authority is known to be special or limited deals at his peril. And, if you find from the evidence that the defendants knew or should have known the conditions that existed, that the authority of Fitzgerald was limited, the plaintiff will not be bound by any agreement or promises alleged to have been made by him contrary to and in disregard of such limitation, even if you should find that he did make them, unless you also find that plaintiff had given him express authority to make such arrangement.

Now, these instructions will apply to any and all contracts alleged to have been made by Mr. Fitzgerald. Now, if you find that plaintiff is entitled to recover on the note set out in the third cause of action, or after you have disposed of that question one way or another, then you will be called upon to consider the other two questions in the case.

The defendants claim that they are entitled to a credit of \$249 and some cents as a rebate on tires which were purchased about September or November of 1921. There is no controversy between the

parties, as I understand it, as to the right of the defendants to credit for a rebate on these tires but the controversy as to the amount. The defendants say it should be \$249. The plaintiff has already given credit for rebate of \$111.68 to the defendants, so that the difference between the parties on that item is \$137.32.

Now the next item is the credit that the defendants are entitled to by reason of the tires delivered by them to Cassidy. They claim a credit of \$9814.20 while the plaintiff says that they are entitled to a credit of only \$1075, so that the difference between the parties upon that item is \$8739.20.

Now the disposition of this item depends upon what you find to have been the agreement between Fitzgerald and the defendants concerning the delivery of the tires to Cassidy, and second, whether or not Fitzgerald had authority to make the contract that was made, whatever you may think it to be.

Now, the defendants' contention is that at the time they made the contract, that is September, 1921, they made a contract with the plaintiff company through Mr. Fitzgerald by which they were to deliver tires to Mr. Cassidy and were to receive a credit for the tires so delivered. The burden of proof is on the defendant to substantiate that position, and if you find by a preponderance of the evidence that such a contract was made, then it will be necessary for you to determine the credit to

which the defendant is entitled by reason of the tires returned to Mr. Cassidy.

Now, the contract is evidenced by the writing—the Fitzgerald letter of September 18, 1921. Under the contract the defendants are entitled to a credit for such tires as they delivered to Cassidy and which were agreeable to him and are entitled only to credit for such tires as were delivered and agreeable to Mr. Cassidy. It is therefore incumbent upon the defendants to establish what quantity of merchandise was delivered to Cassidy and agreeable to him, and it is immaterial how much they sent over, and it is also immaterial what disposition Cassidy made of the tires as far as the plaintiff is concerned. The only question for you to determine is, if the contract was made how much of the merchandise delivered by the defendants to Cassidy was agreeable to him.

Now, that disposes of the issues in this case. You are first to ascertain, in order to arrive at a conclusion of the amount of the plaintiff's claim; that consists of these promissory notes. The second cause—I am assuming now that you dispose of the third cause of action, and if you do—if you find that the defendants' defense for that action is not good, then under this record the plaintiff would be entitled to a judgment for the amount of that note, at least would be entitled to claim the amount of that note with interest. Then you will ascertain the amount due on the other notes, and the amount

due on the open account, and that will state the plaintiff's claim.

Then as against that you will determine the amount of the credits the defendants are entitled to by reason of the rebate for the November delivery, whether that is the amount claimed by the defendants, \$249.00, or whether it is the amount admitted by the plaintiff, \$111.68; and then the amount of credit defendants are entitled to by reason of the tires delivered to Cassidy, and that will constitute the defendants' claim, and the difference, if any between the two, will determine your verdict.

Now you are the exclusive judges of all questions of fact in this case and of the credibility of the witnesses. There has been quite a sharp conflict in some of the testimony. Try to reconcile the testimony on the theory that each of the witnesses was telling the truth if you can; if not then adopt that theory which seems to you under all the circumstances most reasonable.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, individually and as co-partners doing business under the firm name and style of Munnell & Sherrill, Defendants.

Verdict

We the jury impanelled to try the above entitled cause find a verdict in favor of the defendants herein.

J. W. CROSSLEY,
Foreman.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed June 20, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Mohawk Rubber Company, of New York, Inc., a
corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, partners,
under the firm name and style of Munnell &
Sherrill, Defendants.

No. L-8946.

Judgment Order

Now at this day come the parties hereto by their counsel as of yesterday, whereupon the jury impanelled herein being present and answer to their names, the trial of this cause is resumed. And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider their verdict. And thereafter said jury returns to the Court the following verdict, viz:

"We the jury impanelled to try the above en-

titled cause find a verdict in favor of the defendants herein.

J. W. CROSSLEY,
Foreman."

Which verdict is received by the Court and ordered to be filed, whereupon,

IT IS ADJUDGED, That plaintiff take nothing by this action and that defendants do have and recover of and from said plaintiff, their costs and disbursements herein taxed in the sum of \$25.55, and that said defendants have execution therefor.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, individually and as co-partners doing business under the firm name and style of Munnell & Sherrill, Defendants.

No. L-8946.

Motion for a New Trial

Comes now the plaintiff above named and moves for an order setting aside the verdict rendered in the above entitled cause and the judgment entered thereon, and for a new trial upon the following grounds, to-wit:

1. Irregularity in the proceedings on the part of the defendants by which plaintiff was prevented from having a fair trial.

2. Misconduct of the defendants.
3. Insufficiency of the evidence to justify the verdict.
4. That the verdict is against law.
5. Errors in law occurring at the trial and excepted to by the plaintiff.

S. J. BISCHOFF,
Attorney for Plaintiff.

This is to certify that in my opinion the foregoing motion is well founded in law.

S. J. BISCHOFF,
Attorney for Plaintiff.

Please take notice that upon the foregoing motion plaintiff will contend as follows:

I.

That defendants through their counsel were guilty of misconduct and of irregularities in the course of the trial which prevented plaintiffs from having a fair trial; in that defendants' counsel, on numerous occasions throughout the course of the trial, made statements that the merchandise sold by plaintiff to defendants was defective and unmarketable and that said condition of the merchandise was the cause of defendants' inability to meet their obligations to the plaintiff, although no such issue was raised by the pleadings, and said statements were made for the sole purpose of prejudicing the minds of the jurors against the plaintiff and for the purpose of inducing the jury to render a verdict upon considerations foreign to those presented by the pleadings.

II.

That the evidence established affirmatively that Fitzgerald, the employee of the plaintiff, with whom defendants claimed to have made several contracts, had no authority to make any of the agreements claimed to have been made in this case, and there was no evidence in the record sufficient to create an issue of fact as to the scope of Fitzgerald's authority to be submitted to the jury, it being the contention of the plaintiff that where a person dealing with an agent has knowledge of the limitation of the agent's authority, the person dealing with such agent cannot rely upon the so-called implied or apparent authority, and that in such case a person dealing with an agent must ascertain the scope of the agent's authority before entering into a contract with him, and under such conditions the question as to whether the agent had the requisite authority is one of law upon the facts established and not a question of fact.

III.

That there is no evidence in the record to support a finding that defendants did not know of the limitation of Fitzgerald's authority.

IV.

That there is no evidence in the record to support a finding that Fitzgerald did have authority to make the contract claimed by the defendants to have been made.

V.

That defendants failed to establish the first,

second, and fourth defenses set forth in their answer, with respect to the \$9814 worth of merchandise, in that the defenses set up an absolute, unconditional contract on the part of the plaintiff to take back that merchandise from defendants in consideration of their giving up their alleged right to exclusive agency, whereas, the evidence tendered by defendants tended to establish a conditional contract of accord and satisfaction or of novation, depending on contingencies which evidence was a variance from the pleading and fatal to the defense pleaded.

VI.

That defendants failed to establish the existence of a valid contract giving them the right to turn over the \$9814 worth of merchandise in that, they failed to establish any consideration for the alleged agreement, it appearing affirmatively from the record that at the time of said agreement, defendants had no binding right to an exclusive agency and hence, the consent to a change of distributors did not constitute any consideration.

VII.

That defendants failed to establish the contract set forth in the third defense in that, there was no evidence of any consideration for the agreement to give unlimited protection on merchandise for which the defendants had already become absolutely and unconditionally liable, without any right to return

said merchandise, except upon the voluntary acceptance of the plaintiff.

VIII.

That defendants failed to establish the contract set forth in the third defense in that, there is no evidence in the record of authority on the part of Fitzgerald to make said contract.

S. J. BISCHOFF.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed June 27, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, indi-
vidually and as co-partners doing business under
the firm name and style of Munnell & Sherrill,
Defendants.

No. L-8946.

Affidavit in Support of Motion for a New Trial
United States of America,

State of Oregon,

District of Oregon,

County of Multnomah, ss.

I, S. J. Bischoff, being duly sworn on oath, de-
pose and say that I am one of the attorneys for the
plaintiff above named and tried the above entitled
cause on behalf of the plaintiff; that the trial on

behalf of the defendants was conducted by L. A. Liljeqvist; that the action was brought to recover on three certain promissory notes made, executed and delivered by defendants to plaintiff and upon a cause of action for a balance due for goods sold and delivered by plaintiff to defendants; that the defenses interposed consisted of agreements for certain credits on account of merchandise returned and on account of rebates claimed to be due by reason of decline in prices. The pleadings presented no claim on the part of the defendants that the merchandise sold by plaintiff to defendants was defective or of inferior quality or that it was unmarketable. For a more accurate statement of the issues, I refer to the pleadings in the above entitled cause and make the same a part hereof as though herein fully and at length set forth.

That notwithstanding the fact that the pleadings tendered no issue as to any defective material, defendants through their counsel persistently made statements to the jury and to the Court in the presence of the jury at great length, in words and substance and to the effect that the merchandise sold by plaintiff to defendants was of defective and of inferior material, and unsalable, attributed defendants' inability to meet their obligations to plaintiff to that cause; that such statements were presented at the opening of the case to the jury over the objection of the plaintiff, and defendants' counsel sought and did succeed by every means possible in

bringing to the attention of the jury the contention that the merchandise was defective and that it resulted in hardships to the defendants.

That I persistently objected to reference to the aforesaid subject matter and notwithstanding the fact that the Court sustained my objections in this respect, counsel for the defendants, nevertheless, persisted in presenting the same matter over and over again.

That in view of the absence of any issues in this respect and the ruling of the Court at the early stage of the trial, the repeated statements of defendants' counsel to and in the presence of the jury that the merchandise was defective and that defendants suffered by reason thereof, was calculated to and did prejudice the minds of the jurors against the claim of the plaintiff and prevented the jurors from giving the plaintiffs a fair and impartial consideration. That the repeated references by the defendants' counsel in this respect were made for the express purpose of creating said prejudicial condition.

S. J. BISCHOFF.

Subscribed and sworn to before me this 25th day of June, 1923.

(Seal)

GRACE SHEFFIELD,
Notary Public for Oregon.

My commission expires 4-7-24.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed June 27, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGONThe Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, indi-
vidually and as co-partners doing business under
the firm name and style of Munnell & Sherrill,
Defendants.**Affidavit**

STATE OF OREGON,

County of Multnomah, ss.

I, L. A. Liljeqvist, being first duly sworn, depose and say, that I have read the affidavit of S. J. Bischoff filed herein, and deny the allegations therein with reference to the argument to the jury regarding the alleged defective material; that I argued to the Court in several instances the admissibility of the evidence as to the inferior quality of the tires shipped by the plaintiff to the defendants herein in their business, and believed that evidence of such quality was admissible herein, and I deny that references to said alleged defective material was for the purpose of creating any prejudicial condition in the minds of the jury, and deny that any prejudicial condition was created in the minds of the jury.

L. A. LILJEQVIST.

Subscribed and sworn to before me this 2nd day
of July, A. D. 1923.

(Seal)

WM. M. CAKE,
Notary Public for Oregon.

My commission expires Aug. 23, 1924.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed July 3, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, indi-
vidually and as co-partners doing business under
the firm name and style of Munnell & Sherrill,
Defendants.

Memorandum by Bean, District Judge

The motion for a new trial will be overruled.
The authority of Fitzgerald was not material, as
I take it, except as to the alleged contract for the
cancellation of one of the notes, and as to that
there was, in my opinion, sufficient evidence to take
the case to the jury.

The credit claimed of \$249.00 for rebate on tires
did not involve Fitzgerald's authority. It was ad-
mitted that the defendants were entitled to a rebate
on certain specified tires and the dispute was as to
the amount.

There can be no reasonable question on the rec-
ord but what Fitzgerald had authority to make the
agreement of September, 1921, transferring the
business from the defendants to Cassidy, and under
that contract defendants were authorized to turn
over to Cassidy any tires or tubes that they had

in stock and in any quantity or sizes that might be agreeable to themselves and Cassidy, and for such quantity as was thus turned over they were entitled to credit on their account. The only question therefore on that branch of the case was the quantity and value of the tires delivered to Cassidy in pursuance of such contract.

I am not prepared to hold that there was such misconduct on the part of counsel for defendants as would justify a new trial, although I am of the opinion that he should have desisted from repeatedly offering evidence concerning the alleged defect-conformed to the ruling of the Court and relied on his exception of it was error. But a large discretion is necessarily allowed an attorney in presenting his case, and so long as it does not appear that he knowingly and intentionally intended to influence and prejudice the jury by his conduct, his clients should not be made to suffer.

Portland, Oregon, July 30, 1923.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed July 30, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

Mohawk Rubber Company,

vs.

Edgar J. Munnell, et al.

No. L-8946. July 30, 1923.

This cause was heard by the Court upon the

motion of defendants for a new trial herein, plaintiff appearing by Mr. S. J. Bischoff, of counsel, and defendants by Mr. L. A. Liljeqvist, of counsel, and the Court having heard the arguments of counsel and being fully advised in the premises, Upon Consideration Thereof,

IT IS ORDERED that said motion be and the same is hereby denied.

And now, because the foregoing matters and things are not of record in this cause I, R. S. Bean, District Judge and the judge trying the above entitled action in the District Court of the United States, for the District of Oregon, hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above entitled action and contains all the evidence, both oral and written, introduced by all of said parties through said trial, and the exhibits contained herein are all of the exhibits introduced and admitted in evidence by all parties hereto through said trial, and all the rulings of the Court on the questions of law presented and that the exceptions taken by the plaintiff herein were duly taken and allowed and that said bill of exceptions was duly prepared, served, filed and submitted within the time allowed by law, by the rules of Court as extended by the order of this Court, duly made and entered herein extending plaintiff's time in which to prepare and serve this bill of exceptions up to and including August 28, 1923. This bill of ex-

ceptions is now signed, sealed and settled as and for the bill of exceptions in the above entitled action and the same is hereby ordered to be made a part of the record in said action.

Dated this 21 day of August 1923.

R. S. BEAN,

Judge.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, indi-
vidually and as co-partners doing business under
the firm name and style of Munnell & Sherrill,
Defendants.

No. L-8946.

Petition for Writ of Error

To the Honorable Robert S. Bean, Judge of the
District Court aforesaid:

Now comes The Mohawk Rubber Company, a corporation, organized under the laws of the State of New York, the plaintiff above named, and respectfully shows that on the 20th day of June, 1923, a final judgment was entered in the above entitled Court and cause against your petitioner, the plaintiff herein and in favor of the defendants above named, adjudging that the plaintiff take nothing by this action and awarding defendants costs in the sum of \$25.55.

And your petitioner feeling himself aggrieved by said judgment, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of the plaintiff, all of which more fully appears from the assignment of errors filed herewith, petitions the Court for an order allowing petitioner to prosecute a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit.

WHEREFORE, your petitioner prays that a Writ of Error do issue to the said Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of and set forth in the assignment of errors filed herewith be allowed and that an order be made fixing the amount of security to be given by Plaintiff in Error conditioned as the law directs and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to said Circuit Court of Appeals.

Dated August 21, 1923.

S. J. BISCHOFF,

Attorney for Plaintiff and Petitioner.

Due service of the within Petition is hereby admitted and accepted this 22nd day of August, 1923, by receiving a duly certified copy thereof.

CAKE AND CAKE,

L. A. LILJEQVIST.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed Aug. 21, 1923.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Co. of New York, Inc., a
corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, partners
doing business under the firm name and style
of Munnell & Sherrill, Defendants.

No. L-8946.

Assignment of Errors

Comes now the plaintiff above named, appearing herein by Beach & Simon and S. J. Bischoff, its attorneys, and says that the judgment entered in the above entitled Court and cause in favor of the defendants and against the plaintiff on June 20, 1923, is erroneous and against the just rights of the plaintiff, and that error was committed by the Court in the trial of the said cause, in the entry of judgment and the proceedings had and taken thereafter in the following respects, to wit:

I.

The evidence in the record is insufficient to support the verdict rendered in favor of the defendants and the judgment entered thereon in that, first, there is no evidence that W. G. Fitzgerald (the person with whom defendants claimed to have made the contracts set forth in their answer as defenses to plaintiff's cause of action) had authority to make and bind the plaintiff by said contracts; second, there is no evidence in the record to estab-

lish the contracts set forth in defendants' answer, and third, the contracts attempted to be established by defendants are at variance from the contracts set forth in the answer.

II.

The Court erred in overruling plaintiff's motion for the direction of a verdict in its favor, made at the close of the taking of all of the evidence, for the reason that plaintiff's causes of action were undisputed and there was no evidence in the record to establish the defenses set forth in defendants' answer in that, first, there is no evidence that W. G. Fitzgerald (the person with whom defendants claimed to have made the contracts set forth in their answer as defenses to plaintiff's causes of action) had authority to make and bind the plaintiff by said contracts; second, there is no evidence in the record to establish the contracts set forth in defendants' answer, and third, the contracts attempted to be established by defendants are at variance from the contracts set forth in the answer.

III.

The Court erred in admitting testimony of conversations with W. G. Fitzgerald, and evidence of contracts alleged to have been made with him because there was no evidence in the record establishing the scope of Fitzgerald's authority to bind the plaintiff.

IV.

The Court erred in denying plaintiff's motion to set aside the verdict and judgment thereon and to grant a new trial, which motion was based upon the following grounds:

1. Misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter after the Court had repeatedly ruled that such matters were immaterial and not within the issues.

2. Insufficiency of the evidence to support the verdict and the judgment entered thereon.

WHEREFORE the said plaintiff and plaintiff in error prays that the judgment of said Court be reversed with directions that judgment be entered in favor of the plaintiff for the relief prayed for in the complaint.

S. J. BISCHOFF,

Attorney for Plaintiff.

Due service of the within Assignment of Errors is hereby admitted and accepted, this 22nd day of August, 1923, by receiving a duly certified copy thereof. ,

CAKE AND CAKE,
L. A. LILJEQVIST.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed Aug. 21, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, individually and as co-partners doing business under the firm name and style of Munnell & Sherrill, Defendants.

No. L-8946.

Order Allowing Writ of Error

This 21st day of August, 1923, came the plaintiff by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and filed therewith an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had which may be proper in the premises, it is

ORDERED that the Writ of Error be and the same hereby is allowed and the Clerk of this Court is hereby directed to issue such Writ of Error and it is further

ORDERED that the bond to be filed by plaintiff be fixed in the sum of \$500.00.

R. S. BEAN,
Judge.

Due service of the within order is hereby ad-

mitted and accepted, this 21st day of August, 1923,
by receiving a duly certified copy thereof.

CAKE AND CAKE,

L. A. LILJEQVIST.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed Aug. 21, 1923.

G. H. MARSH, Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, partners
under the firm name and style of Munnell &
Sherrill, Defendants.

L-8946.

Bond

KNOW ALL MEN BY THESE PRESENTS:
That The Mohawk Rubber Company of New York,
Inc., a corporation, plaintiff in the above entitled
action, as Principal, and THE UNITED STATES
FIDELITY & GUARANTY CO. OF BALTIMORE,
MARYLAND, a corporation, duly organized and
existing under and by virtue of the laws of the State
of Maryland, and as such corporation authorized
to do business, and doing business in the State of
Oregon, as Surety, are held and firmly bound unto
Edgar J. Munnell & Arthur J. Sherrill, partners
under the firm name and style of Munnell & Sher-
rill, defendants in the above entitled action, in the

sum of \$500.00, to be paid unto said defendants, their administrators, executors or assigns, and for the payment of which sum well and truly to be made we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals, and dated this 21 day of August, 1923.

WHEREAS, the said plaintiff in the above entitled action has prosecuted or is about to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered and entered in the above entitled Court and cause on the 20th day of June, 1923, which said judgment is hereby referred to and made a part hereof,

NOW THEREFORE, the condition of this obligation is such that if said plaintiff in the above entitled action shall prosecute its said writ of error to effect and answer all damages and costs if it fails to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

THE MOHAWK RUBBER COMPANY, a corporation,

By S. J. BISCHOFF,

One of its Attorneys.

THE UNITED STATES FIDELITY & GUAR-
ANTY CO., OF BALTIMORE, MARYLAND,

By H. WESTENFELDER,

Its Attorney-in-Fact.

Approved this 21 day of August, 1923.

R. S. BEAN,

Judge.

Due service of the within Bond is hereby admitted and accepted, this 21 day of August, 1923, by receiving a duly certified copy thereof.

CAKE & CAKE,

L. A. LILJEQVIST.

U. S. DISTRICT COURT, DISTRICT OF OREGON

Filed Aug. 21, 1923.

G. H. MARSH, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH DISTRICT

The Mohawk Rubber Company of New York, Inc.,
a corporation, Plaintiff in Error,

vs.

Edgar J. Munnell and Arthur J. Sherrill, indi-
vidually and as copartners doing business under
the firm name and style of Munnell & Sherrill,
Defendant in Error.

Writ of Error

THE UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA.

To the Judge of the District Court of the United
States for the District of Oregon:

GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before the Honorable Robert

S. Bean, one of you, between The Mohawk Rubber Company of New York, Inc., a corporation, Plaintiff and Plaintiff in Error, and Edgar J. Munnell and Arthur J. Sherrill, individually and as co-partners doing business under the firm name and style of Munnell & Sherrill, Defendant in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of

the United States, this 21st day of August, 1923.

(Seal)

G. H. MARSH,
Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK, Deputy.

Service of the above writ of error made this 21st day of August, 1923, upon the District Court of the United States for the District of Oregon by filing with me as Clerk of said Court a duly certified copy of said writ of error,

G. H. MARSH,
Clerk of the District Court of the United
States for the District of Oregon.

By F. L. BUCK,
Chief Deputy.

Original filed August 21st, 1923.

G. H. MARSH,
Clerk of the United States District Court,
District of Oregon.

By F. L. BUCK,
Chief Deputy Clerk.

Citation on Writ of Error

UNITED STATES OF AMERICA,

District of Oregon, ss.

To Edgar J. Munnell and Arthur J. Sherrill,
individually and as co-partners doing business under
the firm name and style of Munnell & Sherrill, de-
fendants—Greeting:

You are hereby cited and admonished to be and

appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein The Mohawk Rubber Company of New York, Inc., a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 21st day of August, in the year of our Lord, one thousand, nine hundred and twenty-three.

R. S. BEAN,
Judge.

Due and timely service of the within citation is hereby admitted and accepted this 27th day of August, 1923, by receiving a duly certified copy thereof.

CAKE & CAKE and
L. A. LILJEQVIST,
Attorneys for Defendants.

Due and timely service of the writ of error in the within entitled proceeding is hereby admitted and accepted this 27th day of August, 1923, by receiving a duly certified copy thereof.

CAKE & CAKE and
L. A. LILJEQVIST,
Attorneys for Defendants.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON

The Mohawk Rubber Co, of New York, Inc., a corporation, Plaintiff,

vs.

Edgar J. Munnell and Arthur J. Sherrill, partners under the firm name and style of Munnell & Sherrill, Defendants.

No. L-8946.

Praecipe for Transcript of Record on Writ of Error

To G. H. Marsh, Esq., Clerk of the District Court of the United States for the District of Oregon:

Please prepare, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, transcript of record on writ of error, which shall consist of copies of the following:

1. Complaint.
2. Answer.
3. Reply.
4. Bill of Exceptions.
5. Verdict.
6. Judgment.
7. Motion for a new trial.
8. Affidavit in support of motion for a new trial.
9. Affidavit in opposition to motion for a new trial.
10. Opinion of Judge R. S. Bean, on motion denying motion for a new trial.

11. Order denying motion for a new trial.
12. Petition for Writ of Error.
13. Assignment of errors.
14. Order allowing Writ of Error.
15. Writ of Error.
16. Citation.
17. This Praecipe.

Dated this 21 day of August, 1923.

S. J. BISCHOFF,
Attorney for Plaintiff.

Due service of the within Praecipe is hereby admitted and accepted, this 21st day of August, 1923, by receiving a duly certified copy thereof.

CAKE & CAKE,
L. A. LILJEQVIST.

U. S. DISTRICT COURT, DISTRICT OF OREGON
Filed Aug. 21, 1923.

G. H. MARSH, Clerk.
IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON
The Mohawk Rubber Company, Inc., a corporation,
Plaintiff in Error,

vs.

Edgar J. Munnell and Arthur J. Sherrill, indi-
vidually and as co-partners doing business under
the firm name and style of Munnell & Sherrill,
Defendants in Error.

Stipulation for Certification

It is hereby stipulated by and between the re-
spective parties hereto by and through their respec-

tive attorneys, that the transcript of the record on the writ of error in the above entitled cause, shall consist of the complaint, answer, reply, verdict, judgment, bill of exceptions including all of the evidence taken upon the trial of the cause and all of the exhibits offered and received in evidence, motion for a new trial, affidavit in support of motion for a new trial, affidavit in opposition to motion for a new trial, opinion of Judge Bean on motion for a new trial, order denying motion for a new trial, order extending time to prepare, serve and file bill of exceptions, petition for writ of error, assignment of errors, order allowing writ of error, bond on writ of error, writ of error, citation, praecipe for transcript of record and this stipulation; that the plaintiff in error may cause the said transcript of record to be printed under its own supervision instead of under the supervision of the Clerk of the Circuit Court of Appeals of the United States for the Ninth Circuit and when so printed the said transcript of the record shall be submitted to the Clerk of the District Court of the United States for the District of Oregon, for his certificate certifying that said transcript is a true transcript of the record in the above entitled cause, and that the said Clerk shall certify that said printed transcript is a true and correct transcript of the entire record

without comparison thereof with the original record.

Dated August 28th, 1923.

CAKE & CAKE and
L. A. LILJEQVIST,
Attorneys for Plaintiff in Error.
S. J. BISCHOFF,
Attorney for Defendants in Error.

Filed August 28, 1923.

Clerk's Certificate

The Attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record as prepared, compared and tendered to me for certification by the attorneys for the plaintiff in error, is a true transcript of the record in this cause and that I shall certify the same without comparison,

Now therefore in accordance with said stipulation I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify, *without comparison with the original record* that the foregoing transcript of Record upon writ of error in the case in which The Mohawk Rubber Company, Inc., a corporation, is plaintiff and plaintiff in error and Edgar J. Munnell and Arthur J. Sherrill individually and as co-partners doing business under the firm name and style of Munnell & Sherrill, are the defendants and defendants in error, is a full true and correct transcript of the record, and proceedings had in this court in said cause as the same appear of record

and on file in my office and in my custody, the ~~same having been compared by the attorneys for plaintiff in error.~~

And I further certify that the fee for certifying to the within transcript the sum of *sixty-five cents* has been paid by plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland in said District this *22nd* day of *October* 1923.

(Seal)

G. H. Marsh

Clerk.

United States
Circuit Court of Appeals ²

For The Ninth Circuit

THE MOHAWK RUBBER COMPANY OF NEW
YORK, INC., a corporation,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHER-
RILL, individually and as co-partners doing
business under the firm name and style of
MUNNELL & SHERRILL,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

BEACH & SIMON

S. J. BISCHOFF

Attorneys for Plaintiff in Error

CAKE & CAKE

L. A. LILJEQVIST

Attorneys for Defendants in Error

FILED

JAN 23 1925

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United States
Circuit Court of Appeals

For The Ninth Circuit

THE MOHAWK RUBBER COMPANY OF NEW
YORK, INC., a corporation,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHER-
RILL, individually and as co-partners doing
business under the firm name and style of
MUNNELL & SHERRILL,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

ASSIGNMENT OF ERRORS

I.

The evidence is insufficient to support the ver-
dict and judgment entered thereon, in that there is
no evidence that W. G. Fitzgerald had authority to

make and bind the plaintiff by the contracts set forth in the answer.

II.

The court erred in overruling plaintiff's motion for the direction of a verdict in its favor made at the close of the entire case, for the reason that plaintiff's causes of action were undisputed and there was no evidence in the record to establish the defenses set forth in defendants' answer, in that there was no evidence that W. G. Fitzgerald had authority to make and bind the plaintiff by the contracts set forth in the answer.

III.

The court erred in denying plaintiff's motion to set aside the verdict and judgment entered thereon and to grant a new trial, which motion was based upon the following grounds:

1. Misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter, after the court had repeatedly ruled that such matters were immaterial and not within the issues.

2. Insufficiency of the evidence to support the verdict and the judgment entered thereon.

STATEMENT OF THE CASE

Plaintiff is a manufacturer of automobile tires and tubes, known as Mohawk Tires, in Akron, Ohio. Defendants are retail merchants and jobbers in Portland, Oregon, selling, among other things, automobile tires and tire accessories. They began

to purchase merchandise from plaintiff early in 1919. In the fall of 1920 they were indebted to plaintiff in a sum upwards of \$20,000.00, and to liquidate that indebtedness an arrangement was made in November, 1920, by which defendants were permitted to return merchandise amounting to approximately \$6500.00, and the balance was paid by five promissory notes for \$2633.36 each, payable respectively in February, March, April, May and June of 1921. After this adjustment was made in the fall of 1921, defendants bought new merchandise on open account amounting to \$11,739.75.

Defendants paid two of the aforesaid five notes and paid on the open account in cash and by means of credits allowed the defendants, the sum of \$5006.74, so that the defendants owed plaintiff the amount of three notes for \$2633.36 each and the balance on the open account amounting to \$6733.01, and this action was brought to recover these amounts.

Defendants admitted the execution and delivery of the notes described in the complaint and admitted the amount of the balance due on the open account. (Instructions, p. 521.)

The defenses to the four causes of action consist of three claims for credit, all based on agreements alleged to have been made by defendants with one W. G. Fitzgerald, plaintiff's agent.

One claim for credit is for \$9814.20, less \$1075.00 which defendants admitted at the trial they had

received, arises under the following circumstances: In September, 1921, the state of the account between plaintiff and defendants became such that they could no longer continue to do business together. Defendants were indebted to plaintiff in a large sum of money which was long past due and arrangements were made with one Cassidy, doing business as American Tire and Rubber Co., to handle plaintiff's line of tires in the Portland territory. There was no relationship of principal and agent between plaintiff and defendants or between plaintiff and Cassidy. In each case the relationship was merely that of buyer and seller. At the time the arrangement was made with Cassidy, Fitzgerald, who was Pacific Coast sales manager for plaintiff, also arranged with Cassidy and with defendants that Cassidy could draw on defendants for such tires as he needed and were satisfactory to him until the new stock ordered by Cassidy would arrive, and for such stock as Cassidy took from defendants he would be charged by plaintiff and defendants would be credited to that extent. This arrangement was evidenced by the letter of September 18, 1921 (Defendants' Ex. 7, p. 93), reading as follows:

"Munnell & Sherrill,
Portland, Oregon.

Dear Sirs:

This letter will be your authority to turn over to Geo. H. Cassidy, Prop. of the American Tire & Rubber Co. of your city, any Mohawk

tires or tubes that you have in stock at present and in any quantity and sizes that might be agreeable to yourselves and Geo. H. Cassidy, Prop. of the American Tire & Rubber Co.

Please furnish us with a list showing the serials, styles and types of any tires you might turn over to the other party, also furnish us with a list showing the red and grey tubes that might be transferred to the same party. Upon receipt of said lists and information, credit for the amounts will be issued to apply against your account.

Mohawk Rubber Co. Inc. of N. Y.
By W. G. Fitzgerald,
Pacific Coast Manager."

After Fitzgerald made the foregoing arrangements and left, defendants turned over to Cassidy a stock of tires amounting to \$9814.20, out of which amount he retained \$1075.00 worth and shipped the rest to plaintiff's San Francisco branch. Plaintiff refused to accept these tires, caused them to be stored for the account of defendants, and so notified them.

For the purpose of this review, plaintiff makes but one contention, namely, that Fitzgerald had no authority to make and bind it by the agreement which would enable defendants to return merchandise; to turn over merchandise to anyone else, or to relieve defendants from liability in any manner for the purchase price of merchandise; that there was

no evidence in the record of any express, implied or apparent authority on the part of Fitzgerald to make such a contract, and that on the contrary the evidence established affirmatively that defendants **knew** that Fitzgerald was a sales manager whose authority was limited to making sales only, and that they **knew** that he had no authority to make any agreements which would relieve defendants from liability for the merchandise purchased or agreements for credits of any kind whatsoever.

The knowledge on the part of the defendants of the limitations of Fitzgerald's authority referred to above was established by a large volume of documentary evidence which will be referred to in the argument.

The next claim for credit arises out of the following circumstances: In the fall of 1920 defendants were indebted to plaintiff in a large sum of money and were unable to meet the obligation. Defendants wanted plaintiff to accept the return of a large amount of merchandise to be credited against their account, which plaintiff declined to do. Considerable correspondence was had, which resulted in the plaintiff authorizing Fitzgerald to affect an adjustment with defendants which would permit them to return merchandise to the extent of about \$6500.00, the balance of the account was to be settled by accepting the five promissory notes for the sum of \$2633.36 each, referred to above, two of which were paid and three being the notes referred to in the complaint.

Defendants claim, however, that at the time this adjustment was made, Fitzgerald also agreed with them that if at **any time** thereafter, the price of tires should decline, that plaintiff would give defendants credit for the amount of the reduction in price upon **all** of the tires that they had on hand at the time of the adjustment, to-wit, November, 1920, no matter how long prior thereto the tires had been purchased, or as defendants call it, they had an agreement for "unlimited protection" against decline in price. Fitzgerald denied making any such agreement and insisted that the understanding in reference to rebates for decline in price was to the effect that defendants would receive a rebate for all merchandise purchased within sixty days prior to the date of the decline in price and to apply to such merchandise as was on hand and unsold at the time the decline in price was announced. This was the custom of the plaintiff known to defendants and the custom prevailing in the tire trade. (Munnell Xam. p. 434.) No memorandum of such an agreement was made at the time of the settlement, nor did defendants speak of such an agreement in any of the communications that they wrote to Fitzgerald or to the plaintiff.

At the time this adjustment was made (November, 1920) and when defendants claim that the agreement for rebate or "unlimited protection" was made, defendants had on hand about \$35,000.00 worth of tires, practically all of which had been

purchased prior to March, 1920, and a great deal of it had been purchased more than a year prior to the date of the adjustment. (Munnell Xam. pp. 434-435; Sherrill Xam. pp. 197-198.)

The first decline in price that was announced by plaintiff thereafter was May 10, 1921. Defendants then sent a list of the entire stock (H. A. Auspach, defendants' bookkeeper, p. 387) of tires which they had on hand to plaintiff and demanded a rebate on the entire stock to the extent of the decline in price, and defendants' claim is, that Fitzgerald called upon them and that he agreed with them to cancel one note for \$2633.36 in satisfaction of their claim for rebates, instead of figuring the amount of the rebate that they claimed upon the entire stock of tires. Defendants claim that this agreement to cancel the note was done pursuant to the agreement for "unlimited protection" made at the time of the November, 1920, adjustment.

Plaintiff's contention in this respect is, that even if Fitzgerald had made an agreement in November or December, 1920, to rebate or give "unlimited protection" on the entire stock on hand at that time, that plaintiff would not be bound thereby, because it was in excess of his authority, the limitation of which was known to the defendants; that even if Fitzgerald had made an agreement in May or June, 1921, to cancel a note in liquidation of that claim, that plaintiff would not be bound thereby because it was in excess of his authority, the limitation of which was known to defendants.

Both credits will be dealt with in the same argument of this brief, for the reason that they both involve the question of Fitzgerald's authority. The one involves the right of Fitzgerald to bind plaintiff by an agreement for the return of merchandise and the other involves the authority of Fitzgerald to make agreements for rebates and agreements to cancel notes, both of which agreements if made would amount to releasing defendants from liability for the price of merchandise sold and delivered.

Plaintiff also complains of the verdict and judgment entered thereon because of prejudicial misconduct on the part of counsel for defendants. In the opening statement to the jury and in several lengthy speeches during the trial defendants' trial counsel repeatedly brought to the attention of the jury the contention that the tires sold by plaintiff to defendants were of defective quality and that defendants suffered loss thereby, notwithstanding the fact that no such defense was interposed, notwithstanding the fact that it was foreign to any of the issues raised by the pleadings, notwithstanding the fact that plaintiff had repeatedly objected thereto and had specifically called to the attention of the court that such references were assigned as misconduct prejudicial to plaintiff, and notwithstanding the repeated rulings of the court that such references were wholly outside of the issues. That this misconduct resulted in a prejudicial atmosphere is made apparent by the fact that the jury rendered a verdict for the defendant and did not even allow the

plaintiff the balance which defendants in their pleadings admitted was due the plaintiff.

BRIEF OF ARGUMENT

I.

PLAINTIFF'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED. AT THE CLOSE OF THE ENTIRE CASE THERE WAS NO DISPUTE AS TO PLAINTIFF'S CAUSES OF ACTION AND DEFENDANTS HAD FAILED TO ESTABLISH ANY OF THE AFFIRMATIVE DEFENSES OR COUNTER-CLAIMS SET FORTH IN THE ANSWER. THE DEFENSES AND COUNTER-CLAIMS WERE BASED UPON AGREEMENTS ALLEGED TO HAVE BEEN MADE WITH PLAINTIFF'S AGENT. THE RECORD ESTABLISHED THAT DEFENDANTS KNEW OF THE LIMITATIONS OF THE AGENT'S AUTHORITY, HENCE THERE COULD BE NO RECOVERY UPON ANY AGREEMENT MADE WITH THE AGENT, EXCEPT UPON PROOF OF **EXPRESS AUTHORITY**. THERE COULD BE NO RECOVERY UPON THE THEORY OF IMPLIED OR APPARENT AUTHORITY. DEFENDANTS HAD FAILED TO ESTABLISH ANY EXPRESS AUTHORITY, NOR WAS THERE ANY EVIDENCE OF IMPLIED OR APPARENT AUTHORITY TO MAKE THE CONTRACTS RELIED UPON BY DEFENDANTS.

Instructions of the Trial Court, pages 524-525-526;

Slocum vs. N. Y. Life Ins. Co., 228 U. S. 364;
 Salene vs. Queen City Ins. Co., 59 Or. 297,
 116 Pac. 1114;
 Ladd vs. Aetna Ind. Co., 128 Fed. 300;
 Wentworth vs. Winton Co., 95 Or. 541; 188
 Pac. 204;
 Leavitt vs. Dimmick, 86 Or. 278; 168 Pac. 292;
 Long Creek Bldg. Assn. vs. State Ins. Co.,
 29 Or. 569. 46 Pac. 366;
 2 Corpus Juris, 964;
 Aetna Ind. Co. vs. Ladd, 135 Fed. (Ninth Cir-
 cuit) 636-644;
 Keane vs. Pittsburgh Lead Mining Co., 105
 Pac. 60-64.

II.

THE MOTION FOR A NEW TRIAL SHOULD
 HAVE BEEN GRANTED, ON ACCOUNT OF
 THE MISCONDUCT OF DEFENDANTS' COUN-
 SEL IN REPEATEDLY BRINGING TO THE
 ATTENTION OF THE JURY THE CLAIM THAT
 THE MERCHANDISE SOLD BY PLAINTIFF
 TO DEFENDANTS WAS OF DEFECTIVE
 QUALITY AND THAT DEFENDANTS SUF-
 FERED LOSS THEREFROM, NOTWITHSTAND-
 ING THE FACT THAT NO SUCH DEFENSE
 WAS INTERPOSED, THAT IT WAS FOREIGN
 TO ANY ISSUE RAISED BY THE PLEAD-
 INGS, NOTWITHSTANDING OBJECTIONS OF
 PLAINTIFF TO SUCH REFERENCES, THE RE-
 PEATED ANNOUNCEMENT OF PLAINTIFF

THAT SUCH REFERENCES WOULD BE ASSIGNED AS MISCONDUCT, AND THE REPEATED RULINGS OF THE TRIAL COURT THAT SUCH MATTERS WERE NOT WITHIN THE ISSUES.

Chicago City R. R. Co. vs. Gregory, 6 A. & E. Ann. Cas. 221-223; 221 Ill. 591;

Louisville R. R. Co. vs. Payne, 19 A. & E. Ann. Cas. 294;

Cleveland R. R. Co. vs. Pritschaw, 100 A. S. R. 682-687;

People vs. Derbert, 71 Pac. 464;

Chicago R. R. Co. vs. Mines, 77 N.E. 898;

Notes following the case in 6 A. & E. Ann. Cas. 224;

Notes following the case in 19 A. & E. Ann. Cas. 296;

Notes following the case in A. & E. Ann. Cas. 1917 A 441;

People vs. Mullings, 83 Cal. 138; 23 Pac. 229.

III.

THE JUDGMENT SHOULD BE REVERSED WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THE PLAINTIFF.

ARGUMENT

I.

With respect to the scope of Fitzgerald's authority the court instructed the jury as follows:

"But it is equally well settled that one who deals with an agent **knowing** that he is clothed

with a **circumscribed** authority and that his act transcends his authority cannot hold his principal, and this is true whether the agent is general or special, for a principal may limit the authority of one as well as the other. So that, while Mr. Fitzgerald was the Pacific Coast manager of the plaintiff, and while parties dealing with him **without** any **knowledge** of the limitation on his authority had a right to assume that he possessed the authority usually exercised by persons occupying such positions, and if they did so relying on his apparent authority, his acts would be binding upon his principal. But if, in dealing with Fitzgerald, these defendants **knew** that he was exceeding his authority or that he **had no authority to make the particular contract** alleged to have been made, then such agreement would not be binding upon the plaintiff, for one dealing with an agent whose authority is known to be special or limited deals at his peril. And, if you find from the evidence that the **defendants knew or should have known** the conditions that existed, **that the authority of Fitzgerald was limited**, the plaintiff will not be bound by any agreement or promises alleged to have been made by him contrary to and in disregard of such limitation, even if you should find that he did make them, unless you also find that plaintiff had given him **express authority to make such arrangement.**" (Trans. pp. 525-526.)

The law announced in the foregoing instruction is supported by the following authorities:

In *Slocum vs. N. Y. Life Ins. Co.*, 228 U. S. 364:

“One who deals with an agent knowing that he is clothed with a **circumscribed** authority and that his act transcends his power cannot hold his principal, and this is true whether the agent is a general or a special one, for a principal may limit the authority of one as well as of the other.”

In *Salene vs. Queen City Ins. Co.*, 59 Ore. 297, 116 Pac. 1114:

“It is contended that inasmuch as Rowland was the local agent of the defendant, it was bound by his acts within the scope of his **real** or **apparent** authority; but it is equally true that if one dealing with an agent assuming to act for his principal, and at the time **knows the limitations** of the agent’s authority, the former takes nothing by any act of the agent in excess of that authority.”

The foregoing instruction represents the law of the case. The crucial element involved in this proposition of law is the **knowledge or lack of knowledge** of defendants as to any limitation on Fitzgerald’s authority. If they knew that his authority was limited (notwithstanding the title of Pacific Coast manager) they could only recover upon proof of **express authority** to make the particular agreements set forth in their answer. There was no at-

tempt made to establish any **express** authority to make those agreements, hence the only question involved is whether defendants had knowledge of the limitations of Fitzgerald's authority.

To create an issue of fact under this instruction there had to be some substantial evidence tending to show lack of knowledge of the limitation of Fitzgerald's authority, and the record is barren of such evidence.

The fact that Fitzgerald's title was "Pacific Coast manager" does not determine the scope of his authority, for as was said in *Ladd vs. Aetna Indemnity Co.*, 128 Fed. 300:

"The extent of the agent's authority is not determined from the name used to designate the agency. That must be ascertained from the scope and character of the business which the agent is empowered to transact."

It is admitted that Fitzgerald was plaintiff's agent. The question involved here is whether the agreements which defendants claim they made with Fitzgerald were within the scope of his authority. Plaintiff's contention is that defendants knew that Fitzgerald's authority was limited, hence defendants could make no agreements with Fitzgerald relying upon any implied or apparent authority, but could make only such agreements with him as were expressly authorized, and there being no evidence of any express authority at the close of the entire case, plaintiff's motion for a directed verdict should have been granted.

We respectfully submit that the question as to whether Fitzgerald had authority to make the agreements claimed to have been made **should have been disposed of as a question of law on plaintiff's motion for a directed verdict**, and not submitted to the jury as an issue of fact. There was no question of Fitzgerald's agency; that was admitted. The **only question** that presented itself was as to the **scope of his authority upon the record** presented to the court. The law is almost universal that the question of the existence of the agency is one of fact, while the question as to the scope of the agency is one of law.

In Long Creek Bldg. Assn. vs. State Insurance Co., 29 Ore. 569, Justice Robert Bean, then on the Supreme Court Bench of the State of Oregon, held:

“While the existence of an agency is always a question of fact, what may be lawfully done thereunder is a **question of law**. Glenn vs. Savage, 14 Ore. 567, 13 Pac. 442.”

In 2 C. J. 964, the rule is laid down as follows:

“Whether there is any competent evidence to establish the extent of the authority is a question of law for the court, and it has been held that such question should be disposed of by the court alone and should not be submitted to the jury where there is no competent evidence, or where it is clear and undisputed, or manifestly insufficient to prove the authority, or where the facts relating to the authority are

undisputed and are such that reasonable minds could draw only one conclusion therefrom."

And this text is supported by a long line of decisions in almost every state of the Union, including the State of Oregon.

The record in this case comes squarely within the rule announced above, for there is no evidence of any kind to offset or diminish the effect of the notice which the documentary evidence conveyed to the defendants as to Fitzgerald's lack of authority.

The question as to the scope of an agent's authority, is one of fact only, when the testimony is conflicting upon the facts from which knowledge of the lack of authority must be inferred, but where there is no issue as to the facts from which knowledge must be charged to the defendants, the question is one of law, and upon this record we most respectfully submit that it was incumbent upon the court to direct a verdict for the plaintiff, for there was no issue of fact as to the knowledge of defendants of Fitzgerald's lack of authority.

DOCUMENTARY EVIDENCE ESTABLISHING CONCLUSIVELY THAT DEFENDANTS KNEW THAT FITZGERALD HAD NO AUTHORITY TO MAKE THE AGREEMENTS WHICH THEY CLAIM TO HAVE MADE WITH HIM.

Defendants' Exhibit 1 (p. 57) is a telegram dated November 24, 1920, from Mohawk Rubber Co. to Fitzgerald, which specially authorized him to conclude a settlement made in November, 1920. No

mention of any agreement for rebates is contained therein. This telegram was presented by Fitzgerald to defendants and left with them at the time that settlement was made, so that they knew at that time that the adjustment was being made pursuant to express authority. The telegram is as follows:

“Munnell and Sherrill make a complete settlement along lines your letters 19th have all tires returned San Francisco branch get notes for balance including interest since due seven per cent.”

Defendants' Exhibit 3 (p. 70) is a letter of May 10, 1921, by plaintiff to defendants announcing the May, 1921, decline in price. In it plaintiff states to defendants:

“Prices will be adjusted back to May 2nd, and price guarantee will cover goods on hand and unsold, bought during March and April, also unsold portion of dating orders.

Yours very truly,

The Mohawk Rubber Company,
M. E. Mason,
Sales Manager.”

This communication brought home knowledge to defendants that rebates would be allowed only on merchandise purchased during March and April, 1921. Nevertheless defendants insist that Fitzgerald agreed to cancel a note to cover rebates on merchandise that was purchased prior to March, 1920, more than a year prior to the decline in price, and it must be presumed that defendants knew that

Fitzgerald could make no binding agreement, even if he had done so, that would be contrary to the express announcement in the foregoing letter.

Defendants' Exhibit 3 (p. 71) is a circular letter which accompanied the foregoing letter and in it plaintiff again said:

“Our protection is on goods bought during March and April at regular prices and which are on hand and unsold on May 2nd.”

Defendants' Exhibit 5 (p. 81) is a letter from Fitzgerald to defendants dated June 2, 1921. He had received a letter from defendants enclosing their list of tires upon which they claimed a rebate by reason of the May, 1921, decline. In this letter Fitzgerald says:

“In looking over the list and noting various sizes, quantities and etc., we presume that you must have listed every tire you and your dealers have in stock and of course you understand that we cannot rebate on stock regardless of the date it was purchased, there has to be a limit to the protection of distributors on price, otherwise the manufacturer would not stay in business very long.

Send us immediately the serials covering stock mentioned on the list and we will trace them back and find out when shipment was made and those that come within the time limit will be referred to our invoice department and a credit issued for the differential.”

The foregoing letter indicates clearly that Fitz-

gerald was keeping within the announcement of his company that rebates would be allowed only for the purchases made within sixty days prior to the May, 1921, decline, and that he did not know of any agreement to allow rebates for any merchandise purchased prior to that date, and indicates also that he was keeping clearly within the limit of his authority.

Plaintiff's Exhibit "F" (p. 117) is a letter from plaintiff to defendants dated June 18, 1919, written at the time that plaintiff began to do business with defendants. While the negotiations for the commencement of business were carried on between Fitzgerald and the defendants, yet the actual agreement was made by Mr. Mason, representing the plaintiff, indicating that Fitzgerald was **authorized to negotiate but not to close contracts.**

Plaintiff's Exhibit "J" (p. 129) is a letter from Fitzgerald to Munnell & Sherrill dated March 9, 1920. This letter was written by Fitzgerald in response to a letter from defendants to put through an order at an old price after new prices had been announced, and in reply Fitzgerald wrote defendants:

"We received advice from the factory the latter part of last week, **instructing us** not to accept any more orders on the basis of the old price.

"We trust that we are correct in regard to your order and upon its receipt duly signed by

the original purchaser, we will relay same to the factory and endeavor to have it put thru at the old price."

Thus bringing to the attention of defendants that their request had to be relayed by Fitzgerald to the **Home Office** for action and that he had no authority to bind plaintiff by an agreement such as defendants desired.

Plaintiff's Exhibit "K" (p. 131) is a letter from Fitzgerald to Munnell & Sherrill, dated March 15, 1920, referring to the same matter as in the preceding letter, and in it Fitzgerald tells defendants that his willingness to accept the \$10,000.00 order at the old price was

"without the authority of the factory," and after telling them that he sent the order to the factory, he said:

"We can offer you no hopes as to it being accepted by the factory.

.

We are today writing Mr. Mason, **laying all the facts** concerning the Miles and Clark order **before him** and are requesting him to wire you his decision in the matter."

.

"We are giving the factory this information, and they will handle the matter accordingly."

Plaintiff's Exhibit "L" (p: 136) is a letter from Munnell & Sherrill to Fitzgerald dated March 19, 1920. It deals with the same subject involved in the two preceding letters, in which defendants state:

"Now, Fitz, we are leaving this in your hands, and expect you to go to bat for us, as mentioned before. Unless we do not receive some assistance from the factory, we are out of luck, as Miles & Clark have already drawn 21 32x4 from our stock, which was all we had left, and we have given them our word that we would take care of them for enough Cords to equip their 35 cars. Unless we get these out of the factory, we are going to be forced to sell them at a loss, as we have no intention of going back on our word with them."

Defendants' request to Fitzgerald that "he go to bat for us" indicates clearly that defendants knew that Fitzgerald's position was that of an intermediary merely; that he had no authority to grant them their request and that all he could do was to use his influence with his principal.

Plaintiff's Exhibit "M" (p. 139) is a letter from Fitzgerald to Munnell & Sherrill dated March 23, 1920. In it Fitzgerald says to defendants:

"You probably know that the writer handles the **territory** strictly in accordance with the **rules** and policies **outlined to him** by the **factory** and in **cases where considerable money is involved** it is **necessary** for him to confer with the **factory** before committing himself."

.

"We could not give you definite information on the Miles and Clark order, however, until we

had explained the circumstances to the factory, and we were doubtful if they would accept this order on the old basis. However, they wired us last Saturday stating that they would accept one hundred and seventy-five (175) cords on Miles and Clark's order at the old price and also protect you to the extent of the Broadway store order."

Here we have direct communication to defendants to the effect that Fitzgerald acts only upon express instructions from the factory.

Plaintiff's Exhibit "Q" (p. 146) is a letter from Fitzgerald to Munnell & Sherrill dated June 30, 1920, in response to defendants' request for an extension of time for payment, or that plaintiff take back part of their stock of tires. Fitzgerald wrote:

"We note that you would dislike sending the tires back to the factory, but would be forced to do this in case you were not given sufficient time in which to dispose of them. We are to-day writing the factory and also are enclosing your letter and you will hear from them within the next ten days. The writer is unable to give you definite information on the subject of extensions as this is beyond his authority. However, as mentioned above, we are taking the matter up with the factory and feel sure that they will be inclined to help you in every way within reason."

The foregoing letter deals with the subject of extension of time and return of merchandise and

Fitzgerald informs defendants definitely that these matters are beyond his authority. With such information before it, defendants cannot be heard to say that there is any issue as to their knowledge or lack of knowledge with respect to Fitzgerald's authority.

Plaintiff's Exhibit "R" (p. 148) is a letter from the plaintiff's **Home Office** to defendants dated April 5, 1920, in which plaintiff said to defendants:

"We telegraphed Mr. Fitzgerald that he might make you certain concessions. We did this largely in view of the conditions as explained to us."

This communication conveys knowledge to defendants that the right to make concessions comes by express direction from his principal.

Plaintiff's Exhibit "S" (p. 150) is a letter from Fitzgerald to defendants dated July 2, 1920, in which he says:

"In regard to helping you out on your payments with extensions, as we advised you several days ago this matter has been taken up with the factory and you will hear from them within the next several days. We have every reason to believe that they will be willing to help you out in every reasonable manner, as you have so far handled your obligations satisfactorily and the company will not overlook the fact."

Plaintiff's Exhibit "T" (p. 154) is a letter dated

July 8, 1920, from plaintiff's **Home Office** to defendants:

"We have received your letter of June 29th, and our San Francisco branch has also referred to us the letter which you addressed to them on June 26th."

After outlining a plan of settlement, plaintiff then says:

"We are writing our San Francisco branch to make out these notes and forward them to you, as the account is handled on their books.

If the terms which we are outlining are not satisfactory, we shall be willing to alter them in order to co-operate with you."

From this letter it is again apparent that Fitzgerald has not the authority to conclude any adjustment, other than expressly authorized by his principal, and that he is merely used for the purpose of negotiating.

Plaintiff's Exhibit "U" (p. 156) is a letter from Fitzgerald to defendants, in which he says:

"We note copy of a letter written your company under date of July 8th by our Mr. B. J. Brooks, credit manager at Akron, Ohio, which has reference to your unpaid account.

Mr. Brooks has requested that we go over this carefully and send you two acceptances covering this unpaid balance, same maturing August tenth and September tenth. We are,

therefore, enclosing two acceptances in the amount of \$4,908.17 each."

Here again we have an indication that Fitzgerald is merely a "go-between" and is merely carrying out the express directions coming from the Akron Home Office.

Plaintiff's Exhibit "V" (p. 157) is a telegram dated October 27, 1920, from defendants to plaintiff's **Home Office**, in which they say:

"Account returns from dealers would prefer to return some stock to Frisco if agreeable."

Again indicating that they knew that permission to return stock must be obtained from the principal and not from Fitzgerald.

Plaintiff's Exhibit "Y" (p. 163) is a letter dated October 21, 1920, from the plaintiff's **Home Office** (Mr. Mason) to defendants, in which plaintiff says:

"Through a letter received from Mr. Fitzgerald this morning he states that you are worried over a price change which is slated to take place November 1st.

.

"So far as price guarantee is concerned we have always protected on **goods on hand, unsold and purchased within sixty days of a price change**. Whether or not we will continue depends entirely upon what the Federal Trade Board decides as to the practice in several lines of merchandise."

This letter was received about a month prior to the November, 1920, settlement and sets forth the company's position with respect to protection against decline in prices, and points out clearly that protection will only be given on goods "on hand and unsold, purchased within sixty days of a price change. With this information before it, even if Fitzgerald had made an agreement for unlimited protection, it would be clear that it was beyond the scope of his authority, because the plaintiff had notified defendants that their protection would be limited to purchases made within sixty days of the decline and which were on hand and unsold at the time the decline was announced. It is elementary law that the agent could make no more far-reaching agreement than the known limitations fixed by the principal, and yet, notwithstanding that they had knowledge from the principal that they would only be protected on merchandise purchased within sixty days of the decline in price, defendants insist that Fitzgerald made an agreement for unlimited protection, but if he did they knew then that he could make no such agreement.

Plaintiff's Exhibit "BB" (p. 174) is a letter from Fitzgerald to Munnell & Sherrill dated November 1, 1920, in response to defendants' request for leave to return merchandise. Fitzgerald says:

"You probably know that we do not accept returned goods to offset current accounts or obligations incurred on the basis of a straight sale. We are always glad to help out our dis-

tributors by exchanging sizes for those that are moving more rapidly and in some instances a charge of 5 per cent is made for rehandling and so forth. It is too bad that you did not know exactly what you wanted to do when the writer was last in Portland, then this matter could have been settled one way or the other, **as it is necessary for such things to be referred to the factory** and this requires time.

If you desire immediate action on this matter our suggestion is that you send us a list of what you wish to return and upon its receipt it will be **relayed on to our factory and they will write you direct, giving their disposition in the matter.**"

Here again, as late as November 1, 1920, Fitzgerald informs defendants that the matter of returning merchandise must be referred to the factory, conveying clearly the information that he had no authority to deal with that subject.

Plaintiff's Exhibit "FF" (p. 178) is a letter dated November 4, 1920, from defendants to plaintiff's **Home Office**, in which they say:

" . . . After taking up the matter with Mr. Fitzgerald again, and receiving nothing definite, got in touch with him by long distance, and told him that we wanted to do something immediately regarding our stock, and he promised he would let us know something definite just as soon as he could get word to the factory."

In this letter we have defendants' acknowledge-

ment that Fitzgerald had informed them that he had to refer their requests to the factory.

Plaintiff's Exhibit "GG" (p. 180) is a letter dated November 4, 1920, from defendants to Fitzgerald, in which they say:

"We are **writing the factory** today regarding the disposition of these tires, and trust that we will receive something definite from them within the next few days."

In this letter we have defendants' acknowledgement that they knew that they had to deal with the factory in connection with such matters as are here under consideration.

Plaintiff's Exhibit "II" (p. 183) is a telegram dated November 9, 1920, from plaintiff's **Home Office** to defendants, in which they say:

"We have no intention of allowing return of your entire stock and letter written by Frisco does not indicate any such agreement."

Plaintiff's Exhibit "JJ" (p. 184) is a letter from plaintiff's **Home Office** to defendants, dated November 9, 1920, in which they say:

"We haven't the slightest intention of letting any customer dump his entire stock upon us and ship his entire burden to us."

After plaintiff had notified defendants that they would not permit a customer to dump his entire stock upon them, Fitzgerald certainly could make no agreement which went beyond the plaintiff's announcement, unless specifically authorized to do so.

Plaintiff's Exhibit "KK" (p. 188) is a letter dated

November 10, 1920, from Fitzgerald to defendants, in which he says:

"We have told you that the matter of you returning stock for credit, that is to offset your debits, is entirely up to the credit department at Akron, and we believe they have written you on the subject.

You must not forget that the writer's authority with this company is limited to certain matters, such as the selling of goods, territorial arrangements, etc., but when it comes to credits, return of unsold merchandise and things of that caliber, then you are dealing with our credit department, because after we have made a sale of goods then the matter passes out of our hands into those of the credit department at Akron, and we have no authority to take action on matters pertaining to their department."

This letter being dated November 10, 1920, in San Francisco, was received in Portland a day or two later, or approximately two or three weeks before the November, 1920, adjustment was made, and advises explicitly as to what authority Fitzgerald possesses and to what extent his authority is limited. In the face of this information defendants could make no agreement with Fitzgerald, which would be binding upon the plaintiff, giving defendants unlimited protection. Nor could they make an agreement with Fitzgerald which would result in the return of practically their entire stock of mer-

chandise to the plaintiff. In the face of this letter defendants cannot be heard to say that there was any issue of fact as to the knowledge or lack of knowledge as to the scope of Fitzgerald's authority.

In the same letter Fitzgerald says to defendants:

"Write to our factory and tell them what you want in the way of extensions. If they are reasonable, then you can rest assured the request will be given favorable consideration. They do not expect you to do the impossible, they only feel that you should bear your part of the burden and in the meantime do everything within your power to reduce your stock along legitimate lines."

In this statement we have summed up the position which Fitzgerald assumed in his negotiations with defendants and shows clearly that he was undertaking to act as an intermediary, making suggestions merely and using his best endeavors to obtain favorable concessions for defendants, but throughout all of that he took precautions to advise defendants clearly that he was in no position to make agreements for his company.

Plaintiff's Exhibit "RR" (p. 209) is a letter dated February 5, 1921, from Fitzgerald to defendants. In answer to the requests of defendants that he accept Liberty Bonds at face value instead of at market value on account of their indebtedness to the plaintiff, Fitzgerald wrote:

"Regarding your recent offer to turn over to us a number of Liberty Bonds we beg to ad-

wise that we took this matter up with the factory and are this morning in receipt of a letter from them stating that they could only agree to take these bonds at market value, which would really be not better than you could sell same thru your local bank."

Plaintiff's Exhibit "SS" (p. 210) is a letter dated February 9, 1921, from defendants to Fitzgerald, in which they say to him:

"If the factory can find a way to realize on these bonds at face value, we will be glad to turn them over to apply on account, at any time."

Plaintiff's Exhibit "TT" (p. 211) is a letter from Fitzgerald to defendants, dated February 11, 1921, in which he says:

"As for being able to take these Liberty Bonds in the future, we will have to submit your letter to our Eastern office and if they have any suggestions we are asking them to writ to you."

Plaintiff's Exhibit "UU" (p. 212) is a letter dated February 11, 1921, from defendants to Fitzgerald, in which they say:

"We have not written the factory direct, as we wanted you to add your comments to this letter, knowing as you do what we have been up against this winter. Trusting they will appreciate our position, we are, etc."

Plaintiff's Exhibit "VV" (p. 213) is a letter dated February 17, 1921, from defendants to Fitzgerald, in which, among other things, they say:

"If you have not already done so, I wish you would again take up the matter of Liberty Bonds with the factory and see if they cannot take at least part of what we have."

Plaintiff's Exhibit "WW" (p. 217) is a letter from the **Home Office** to Munnell & Sherrill, dated February 21, 1921, in which plaintiff says:

"We are surprise to have you think that we could accept Liberty Bonds at par value."

Plaintiff's Exhibit "XX" (p. 219) is a letter dated February 23, 1921, from Fitzgerald to defendants, in which he says:

"We note what you say in reference to your Liberty Bonds and your inability to take care of your recent note. We have again taken this matter up with the factory and it is possible that we will hear from them the early part of this week. Just as soon as we do we will communicate with you further."

All of the foregoing letters dealing with the subject of Liberty Bonds and several others in the record dealing with the same subject, show clearly that Fitzgerald advised defendants that he had no authority to accept them at par value and that defendants would have to take that matter up with the factory or home office, which alone could pass on that question, and again calling to their attention the limitation on Fitzgerald's authority.

These letters also confirm the position which Fitzgerald assumed in his negotiations with defend-

ants, for throughout this correspondence defendants called upon Fitzgerald to take the matter up with the Home Office for the purpose of inducing them to accept the Liberty Bonds at par value, indicating that they recognized his position as an intermediary and knew of his inability to act on his own judgment.

Defendants' Exhibit 27 (p. 305) is a letter dated November 13, 1921, from defendants to plaintiff's **Home Office** and was directed to the attention of Mr. Mason. In it they say, among other things:

"We regret exceedingly if Mr. Fitzgerald has exceeded his authority in this matter."

Again indicating that the lack of Fitzgerald's authority had been called to their attention.

There is no dispute as to the receipt of any of these letters or communications and the information contained therein is, of course, chargeable to the defendants. How can it be said then, that defendants did not know that Fitzgerald's authority was not limited. We submit that there is not a scintilla of evidence which would create an issue of fact upon that subject.

RESUME' OF PLAINTIFF'S ORAL EVIDENCE AS TO THE SCOPE OF FITZGERALD'S AUTHORITY AND AS TO THE KNOWLEDGE OF THE DEFENDANTS IN RESPECT THERETO.

MORRIS E. MASON, President and Sales Manager (p. 40) of the plaintiff company, testified that

he has the authority and control of the sales and distribution of plaintiff's products and that the duty to make agreements covering sales and distribution is granted to no other party **"except on authority from me."** (p. 41.)

"Mr. Fitzgerald is manager of our San Francisco branch. He has authority to conduct the routine business of the branch, operating at all times subject to the orders of this office. He has no authority to enter into agreements, contracts or leases, which are not especially approved by the home office at Akron. He has no authority to draw upon the company funds except for small or minor expenditures."

Q. 20. Was the agreement with W. G. Fitzgerald oral or in writing with respect to the scope of his authority? . . .

A. 20. Oral. Mr. Fitzgerald has received no complete, definite, written instructions covering all of his duties. At the time he took charge of the San Francisco branch, which was May 1st, 1919, he spent some time in the office at Akron, Ohio, receiving instructions as to his duty and authority in connection with his management of the branch. Such oral instructions have been supplemented from time to time by letters covering some specific instance or question. In these oral instructions he was told that he had no authority to sign or bind this company on leases or contracts of any nature. That all such

agreements must be subject to my approval at Akron, Ohio. This included all special agreements, written or otherwise, covering the assignment of any territory other than an individual city, where special distributors' prices or special terms of any kind not enjoyed by regular dealers' trade were given.

Q. 21. Was W. G. Fitzgerald ever authorized to make contracts with purchasers of tires, either as retailers or jobbers, or in any other capacity, giving them unlimited protection against declines in prices?

A. 21. Absolutely not.

Q. 22. Was W. G. Filtzgerald ever authorized to make an agreement with defendants in September, 1921, or at any other time, by which the defendants would have the right to turn over their entire stock of tires to the plaintiff or its agents and receive credit therefor?

A. 22. No.

Q. 25. Was W. G. Fitzgerald ever authorized to enter into an agreement with defendants by which they could turn over the whole or any part of their stock of tires to the American Tire & Rubber Co. and receive credit therefor from plaintiff?

A. No." (p. 461.)

W. G. FITZGERALD denied that he made the agreements claimed by defendants and emphatically insisted that he had no authority to make such

agreements and that he so informed defendants. His testimony in this connection is as follows:

On cross examination he testified: (p. 53.)

“Q. Now you had authority from the factory to take these tires back, didn’t you?

A. Yes, sir.

Q. Did you get authority from the factory in reference to this transaction? (Referring to the November, 1920, settlement in which defendants were permitted to return about \$6000.00 worth of tires and to pay the balance due by five notes.)

A. On this particular transaction of \$6000.

Q. Yes.

A. Yes, sir.

Q. It wasn’t necessary, was it?

A. Yes, sir.

Q. Wherein was it necessary?

A. Because I hadn’t authority to allow anybody to return goods.

Q. You are the Pacific Coast manager?

A. I am.

Q. You handle the entire Pacific Coast on behalf of the Mohawk Rubber Co.?

A. The selling end.”

The November, 1920, settlement was made by Fitzgerald pursuant to authority from the home office, shown by the telegram of November 24th, 1920, Defendants’ Exhibit 1. (p. 57.) This telegram was left by Fitzgerald with defendants when he made the November, 1920, settlement (p. 55) and

indicates that Fitzgerald was making the arrangements by express authority from the plaintiff and that defendants knew it. On direct examination Fitzgerald testified (pp. 470-472):

Q. Who gave you your instructions or your authority?

A. Mr. M. E. Mason, our Sales Manager.

Q. At Akron, Ohio?

A. Yes, sir.

Q. What was the authority conferred on you in this business?

A. Well the only authority that myself or any manager of the Mohawk Company possesses, outside of Mr. Mason, is to go out and sell goods. We have prices to sell this merchandise at, and if there is anything—any special arrangements to be made outside of regular, we have to take these things up first with Mr. Mason before we can act.

Q. Does Mr. Mason fix the prices at which you can sell?

A. Well I don't know whether Mr. Mason himself fixes them, but our instructions come from Mr. Mason.

Q. You are furnished with prices at which you are to sell?

A. Yes, sir.

Q. And have you any authority to deviate from these prices?

A. Not the slightest.

Q. Who furnishes you with the terms of sale?

A. Mr. Mason.

Q. Now was there ever any authority granted to you to release payment of notes?

A. No, sir.

Q. Or to grant credits?

A. No, sir.

Q. Who did that in the management of the business?

A. Well, when we began to do business with Munnell & Sherrill our credit department at that time was in charge of a gentleman by the name of Fisk.

Q. I don't mean the name of the person; but what part of this institution handles these matters?

A. The Credit Department at Akron.

Q. At Akron, Ohio?

A. Yes, sir.

Q. As I understand it, your authority in respect to this business is that of sales?

A. Strictly.

Q. Except such special instructions as you may get to do any particular thing?

A. Yes, sir.

Q. When you made these calls upon Munnell & Sherrill during 1920, you say that was in your capacity as salesman for the Pacific Coast?

A. Yes, sir.

Q. Now on those occasions did either Mr. Munnell or Mr. Sherrill request any accommodations from you in the way of privileges of returning merchandise?

A. Yes, sir.

Q. Or credits or things of that sort?

A. Yes, sir.

Q. How often?

A. Well, I couldn't say how often, but in each instance I told them I would take the matter up with our factory and see what I could do.

Q. Did you ever give him permission or grant his request on the spot?

A. No, sir.

Q. Without taking them up with the factory and obtaining specific directions therefor?

A. No, sir, I did not.

Q. Did you ever state to Mr. Munnell or Mr. Sherrill on these occasions whether you had or had not authority to do the things that were requested of you?

A. Well, I think Mr. Munnell and Mr. Sherrill generally understood that my authority was limited.

Q. Did you ever say that to them?

A. I have; I have told them that.

Q. What did you tell them in that respect?

A. Well, in each instance where they asked for something that was beyond my authority, why I have explained to them that I had no

right to do this or do that, but I would have to take it up with the factory.

Q. As I understand it, you were frequently using your endeavor to obtain from the factory favorable consideration of their requests?

A. In every instance.

(p. 473.)

Q. And when you came here what disposition was made of their account?

A. Well, when I came it was agreed—after I got authority from my factory—to allow them to return a sum of goods amounting to about \$6500, if I am not mistaken, and that that \$6500 worth of merchandise which they returned and the notes which they gave us a few days afterwards, which were mailed to us—that took care of their account to date, as far as I know.

(Trans. p. 480.)

Q. Did you agree with them at that interview that a note would be cancelled?

A. No, I did not.

Q. What did you say to them about that?

A. I told them that I would take the matter up with the factory and endeavor to have one of them cancelled.

Q. Did the factory ever permit that to be done?

A. They did not.

(Trans. p. 481.)

Q. Had you received any—up to that time,

up to this interview of June 18th, had you received any instructions from the home office authorizing you to agree to a cancellation of any of the notes?

A. I did not.

Q. Or to vary from the terms of the rebate as set forth in the announcement of May 10th?

A. No, sir.

(Trans. p. 491.)

Q. Had you been authorized by the Mohawk Company to make any arrangement which would result in these tires coming back to them?

A. I had not.

(Trans. p. 495.)

A. . . . Now I had no authority to tell Munnell & Sherrill, or neither did I tell them, that when they gave me those notes, or sent those notes in to our factory, that these goods would just automatically revert in their purchase, don't you see, on the Spring dating terms. I didn't tell them that, I couldn't have told them that.

(Trans. p. 508.)

A. Well, I have authority to make—to sell merchandise, to make territorial arrangements, to hire salesmen, and to conduct the selling end of our business.

RESUME' OF DEFENDANTS ORAL TESTIMONY AS TO KNOWLEDGE OF THE LIMITATION OF FITZGERALD'S AUTHORITY.

Sherrill's testimony (pp. 122-123):

"Q. Mr. Sherrill, I want you to stick to the incident I am talking about. We will come to the other later. I am talking about the time when you requested Mr. Fitzgerald to take back the \$10,000 worth of tires, the tires that were shipped to enable you to fill that order, and when you found you couldn't fill it, you requested him to take that stuff back. Didn't he tell you then that he couldn't tell you anything about it? That he had no authority? That he would have to take it up with the home office and see if he couldn't induce them to permit him to take them back, or words to that effect?

A. I don't recall that.

Q. Did he say anything to you on that subject at that time?

A. He has at various times.

Q. He has told you that he would have to take it up with the home office, at various times? Is that right?

A. Certain things."

.

"Q. But when you wanted to return tires out of stock, then Mr. Fitzgerald said to you that he would have to take it up with the home office, and suggested that he would do his very best to have them make favorable adjustment with you, is that right?

A. Not at the time that we agreed in San Francisco on the return of the stock; he didn't say anything about that.

Q. But at other times he did?

A. It is possible he did.

Q. So that you knew to some extent, at any rate, that his authority to make agreements with you was not complete, that it was limited, that he did have to ask authority or consent from the home office?

A. Well, the same as any other coast manager, I presume.

Q. I am going to ask you to answer that question. (Question read.)

A. I would presume that he would have to take up matters of importance with his home office, yes, if it was a matter of importance."

Sherrill's testimony (p. 238):

"Q. Of course Mr. Fitzgerald was very kindly disposed towards your firm during all the time you did business together, wasn't he?

A. I think he was, yes, sir.
the time you did business together, wasn't he?
was frequently trying to get the factory to make concessions for you and do things for you that he couldn't do himself?

A. We expected him to help us out wherever he could.

Q. And whenever a situation arose where you needed some assistance which you were not

actually entitled to, you looked for Fitzgerald to go to the bat for you, as one of your letters indicates?

A. We expected him to help us out whenever he could.

Q. And Mr. Fitzgerald did frequently urge his house to make you concessions, didn't he?

A. I presume that he interceded for us at times.

Q. You know he did, don't you? You say presumed. You know that to be a fact, don't you?

A. In certain cases, yes.

Munnell's cross-examination (pp. 426-427):

"Q. Mr. Munnell, you frequently made requests of Mr. Fitzgerald to take up with the factory various allowances to be made, credits, return of merchandise, extensions and such things, didn't you?

A. I think we did, yes.

Q. And on each occasion when you took that matter up, didn't he tell you that he would have to refer that matter to the company for their determination?

A. No, he didn't, not in each instance.

Q. Did he make that observation to you on some occasions?

A. Some occasions he did, yes.

Q. And did he tell you that he was not in position to consent to any such arrangement without approval of the home office at Akron, the factory?

A. We might have asked him some things he didn't have authority to settle. In most of the cases he had the authority, at least he made the settlement.

Q. Among the things that he told you he couldn't arrange for without the approval of the company, was the matter of return of merchandise, didn't he?

A. He accepted return of part of it without taking it up with the factory.

Q. During 1920 you had requested from him permission to return merchandise, hadn't you?

A. Yes.

Q. And didn't he tell you then in conversation, and also write you, that such matters were out of his jurisdiction, that he would refer it and take it up with the house for you?

A. I think he did in some instances, yes.

Q. Was that matter—

A. He agreed to take some merchandise that wasn't in controversy at all."

.
(p. 428.)

"Q. At any rate, later you did find that in the matter of returning merchandise he had to get instructions from Akron?

A. There were a number of times when he hesitated without getting some special instructions."

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Q. Didn't he in that respect tell you that he had to communicate with the house, and that he would use his—the language in one of his letters, he would “go to the bat for you,” to see what he could do?

A. That is in the correspondence all right, yes.

Q. You knew that. Now then in another instance that you had knowledge of, with respect to inducing the company to accept Liberty Bonds—you wanted Fitzgerald to induce them to do that, didn't you?

A. I don't think we wanted him to induce them to, we tried pretty hard to get rid of our Liberty Bonds to them, yes.

Q. Well then you wrote Mr. Fitzgerald about it?

A. Practically all of our correspondence started at the San Francisco office.

Q. And then didn't he tell you that that was beyond his scope, and that he would have to take it up with the home office?

A. I think he did, yes.

(p. 431.)

“A. . . . He came here and offered wire from the factory showing they told him to let us return some tires and take notes for the balance. We didn't know what his instructions were here.”

I. H. PECK, a witness called by the plaintiff, testified that he was present at a conversation be-

tween Sherrill and Cassidy after this action was commenced, and in this conversation Sherrill said to Cassidy (p. 466):

“A. We were visiting along, and the question of this trial came up, and Mr. Sherrill said, ‘I have always liked Mr. Fitzgerald very much, and if this case comes to court I will have to bring up matters which will put Mr. Fitzgerald in a bad light with the Mohawk factory, which he represents, because Mr. Fitzgerald has made special agreements with me which I am satisfied were not known by the factory.’ ”

Neither Sherrill or Cassidy contradicted this testimony. This statement indicates that Sherrill knew that he was claiming an agreement with Fitzgerald which Fitzgerald had no authority to make.

We respectfully invite the attention of the court to the following cases that present situations like the case at bar.

In *Wentworth v. Winton Co.*, 95 Ore. 541, plaintiff's assignor was the Portland distributor of automobiles manufactured by defendant, an Eastern corporation. Difficulties arose in their accounts and defendant sent one Miller, its **“manager of the factory branch at Seattle, Wash.,”** to negotiate a settlement of the differences between the parties. On **November 30, 1912**, in the course of the negotiations for a settlement, Miller wrote plaintiff's assignor a letter in which he said:

"Confirming a talk I had with your Mr. Ettinger regarding what the writer, personally, would be willing to do, which talk or action must be verified by our home office at Cleveland.

I would state that it would be satisfactory to assume the lease on the building you now occupy, known as the Winton Bldg., with the understanding that the rent of this building is \$300 per month, with the privilege of subleasing any part of the rooms now occupied by other tenants."

.

"It is distinctly understood that this is not a proposition; it is only a line of suggestion for you either to accept or reject and for me to take up with the home office."

In February, 1913, a written contract was closed upon the terms outlined in Miller's letter.

Plaintiff's assignor claimed, however, that at the time it made the agreement with Miller, that Miller also agreed to pay the rent which was in arrears up to the time that the agreement was made, as a part of his contract of settlement, and in passing upon the question as to the right of Miller to bind defendant by such an agreement, the Supreme Court of Oregon held:

"1, 2. Thus it is seen that, while the Oregon company was dealing with Miller as a known agent of the Winton Company, nevertheless the

Oregon company was in no position to assume that Miller's agency was general, because the Oregon company had information to the contrary: *Leavitt & Co. v. Dimmick*, 86 Ore. 278, 288 (168 Pac. 293); *Hillyard v. Hewitt*, 61 Ore. 58, 62 (120 Pac. 750); *Aerne v. Gostlow*, 60 Ore. 113, 121 (118 Pac. 277). Miller had authority to negotiate for the Winton Company, but he was without authority to bind it. The Oregon company was **told by Miller** in express words by the letter of **November 30th, that he had no authority**, except to negotiate; and the fact that the written contract, after having been signed by the Oregon company, was delivered to Miller to be forwarded to Cleveland, Ohio, there to be signed by the officers of the defendants, was of itself an indisputable acknowledgment of Miller's lack of authority to bind the Winton Company."

The same condition exists in the case at bar. Fitzgerald occupied the same position as the agent in the case cited. Fitzgerald wrote defendants calling attention to his lack of authority, just as Miller did in that case. We call special attention to the letter of November 10, 1920, (Plaintiff's Exhibit KK, p. 188) in which he uses language substantially like the language in the case cited. In that case the court said:

"The Oregon company was told by Miller in express words by the letter of November 30,

that he had no authority except to negotiate." tiate."

And in the case at bar **Fitzgerald told defendants not once** but many times that he had no authority to accede to the several demands that they had made, among them demands for leave to return merchandise and demands for credits, for he said to them:

"We have told you that the matter of your returning stock for credit, that is to offset your debits, is entirely up to the credit department at Akron and we believe they have written you on that subject.

You must not forget that the writer's authority with this company is limited to certain matters, such as the selling of goods, territorial arrangements and etc., but when it comes to credits, return of unsold merchandise and things of that caliber, then you are dealing with our credit department, because after we have made a sale of goods, then the matter passes out of our hands into those of the credit department at Akron, and we have no authority to take action on matters pertaining to their department." (Plaintiff's Exhibit KK, p. 188.)

The determination in the case cited turned upon the proposition that the party dealing with the agent **knew** of the agent's limited authority through the agent's own communication to him. That is precisely the proposition involved in the case at bar, and the record clearly shows that defendants knew of Fitzgerald's lack of authority. We submit

that the foregoing decision, if not controlling, is entitled to great weight in determining the question involved in this case, as representing the law of the State of Oregon on the particular subject under consideration, the State in which the alleged agreements were made.

In *Leavitt v. Dimmick*, 86 Ore. 278, a contract was negotiated by one Scarlett, also a "branch manager," and it was claimed that he had made an agreement which his principal claimed was beyond the scope of his authority to make. The only evidence in the record as to **knowledge** on the part of the defendant as to the limitation of the "branch manager's" authority consisted of a statement in a contract which had been entered into between plaintiff and defendant two or three years prior to the time that the agreement in controversy was made. This earlier contract contained a clause providing that it should not be considered in force until approved and signed by the vice-president. The Supreme Court of Oregon, speaking through Chief Justice McBride, said:

"The alleged oral agreement was not within the actual or apparent power of the agent to execute. Defendant had been doing business as plaintiff's sales agent in 1912, and the agreement for that year contained a clause, providing that it should not be considered in force until approved by the vice-president, and another clause which provided that its acceptance

should be evidenced by the signature of plaintiff's vice president. It will thus be seen that defendant had full notice of the extent of the agent's powers; and, if with this notice he chose to rely upon a 'gentleman's agreement' with the agent, he did so at his peril. It is said in *Hillyard v. Hewitt*, *supra*:

'Parties dealing with an admitted agent of another have a right to assume, in **the absence of anything indicating a contrary state of affairs, that his agency is general.**' *Aerne v. Gostlow*, 60 Ore. 113, 118 Pac. 277.

In the case at bar everything indicated a **'contrary state of affairs.'** Every contract which the defendant signed was notice to him that the agent's authority was limited, and with such notice it was defendant's duty to inquire and ascertain the extent of the agent's authority before acting upon the alleged oral contract."

We submit that the case cited is particularly applicable to the case at bar, for in that case the court held that the party dealing with the agent, having notice of the branch manager's limitation of authority, could not "rely upon a gentleman's agreement with the agent," and if he did so it was at his peril. In the case at bar all of the correspondence indicates a "contrary state of affairs," which precludes any assumption that Fitzgerald had a general agency.

In denying plaintiff's motion for a directed verdict the court observed:

"I think his authority is a question for the jury. Mr. Fitzgerald testified that he had authority to make any contract that he did make."

We submit that even if Fitzgerald had so testified, that this testimony would not be binding on the plaintiff, **for his own** statement that he had authority is a statement of a bare conclusion of law and an assumption of authority, and if his authority was in fact limited and defendants knew of the limitation, his assumption of authority would not be binding upon the plaintiff.

In *Aetna Indemnity Co. v. Ladd*, 135 Fed. 636, 644, (Ninth Circuit), this court held:

"It was proper for the witness to testify in what capacity he was acting in obtaining this money, for whom he acted when he borrowed it, and his understanding of the relation he bore to the transaction. **His statement could not bind the plaintiff in error**, nor prejudice his rights."

In *Keane v. Pittsburg Lead Mining Company*, 105 Pac. 60, 64, the agent was asked:

"Q. You had full authority to make that agreement in escrow from Mr. Keane?"

The court held:

"This question was clearly erroneous. It was not what the witness' opinion may have

been as to what his authority was that determined his authority, but such authority must be determined from the facts."

Upon the foregoing authorities it is clear that **Fitzgeralds's own statement** as to his authority could not bind the plaintiff if the evidence established that he did not possess such authority and defendants had knowledge of the limitation.

But the record discloses that Fitzgerald's testimony that he "had authority to make any contract that he did make" must be read together with the testimony that he had obtained **express** authority to make those agreements, so that when he spoke of having the authority it was **based upon the receipt of express** authority in each instance.

His agreement to take back \$6000.00 worth of merchandise and notes to settle the account in November, 1920, was upon **express authorization as to that transaction** (pp. 53-54). He testified:

"Q. Now you had authority from the factory to take those tires back, didn't you? (referring to the \$6500.00 worth included in the November, 1920, settlement.)

A. Yes, sir.

Q. Did you get authority from the factory in reference to this transaction?

A. On this particular transaction of \$6000.00?

Q. Yes.

A. Yes, sir.

Q. It wasn't necessary, was it?

A. Yes, sir.

Q. Wherein was it necessary?

A. **Because I hadn't authority to allow anybody to return goods.**

Q. You haven't any authority?

A. **No, my authority is limited, simply selling; that is my authority, to sell goods.**

Q. You are the Pacific Coast Manager?

A. I am.

Q. You handle the entire Pacific Coast on behalf of the Mohawk Rubber Company?

A. **The selling end.**

This testimony illustrates that the court's assumption, as to Fitzgerald's testimony, was not in accordance with the testimony as given.

The cross-examination of Fitzgerald, when taken as a whole, shows that when he testified that he had authority to make the agreements that he had made, **that he referred to those agreements which he admitted that he had, in fact, made.** But it will be remembered that he **denied emphatically having made an agreement for price protection or an agreement for the return of merchandise or for the cancellation of a note,** so that the statement that he had authority to make the contracts that he did make is only **co-extensive** with his statement as to the agreements he admitted having made. In other words, when he said he had authority to make the agreements that he did make, he referred to those agreements which he admitted having made, and not to agreements which he denied having made.

With respect to agreements for rebates, cancellation of notes, return of merchandise he emphatically denied having made those agreements and emphatically denied the authority to make them. This is illustrated by the testimony, of which the following is a fair illustration:

“Now I had no authority to tell Munnell & Sherrill, or neither did I tell them, that when they gave me those notes, or sent these notes in to our factory, that these goods would just automatically revert in their purchase, don’t you see, on the Spring dating terms. I didn’t tell them that. I couldn’t have told them that.”
(Page 495.)

At page 502 he testifies:

“Q. You say you didn’t have any right or any power back there in December, to make an agreement to guarantee Munnell & Sherrill against a price decline?

A. I have not.”

This and a great deal of additional testimony in the record of like character shows that Fitzgerald did not admit that he had authority to make agreements for rebates, cancellation of notes and return of merchandise, and the observation of the court in denying the motion for a directed verdict was not supported by the record.

We submit that Fitzgerald’s **testimony must be taken as a whole** and the effect gathered therefrom. We cannot cull from the record a single statement and disregard the qualifying statements.

At pages 503 to 505 he testifies with respect to **two specific instances** in which he made agreements for price protection, one in Seattle and one in Spokane, but the evidence shows that in each instance he had **specific telegraphic instruction** to make the agreement. Moreover, these agreements were upon **merchandise purchased** by these people **at the time the agreement was made**. The price protection was **not upon old stocks** of merchandise, as claimed in this case.

He was asked (page 504):

“You had the same authority when you made this settlement you had on that of Munnell & Sherrall, didn’t you?”

A. **I did not.**”

With respect to the Seattle and Spokane instances, he testifies (pages 504-505):

“**I wired my company for permission** to give these people that particular protection on that particular order, and they got it.”

We submit that in order to hold plaintiff liable on the contracts made with Fitzgerald, as set up in their answer, that they had to establish the same character of express authority as existed in the Seattle and Spokane instances.

Sherrill testified (page 116) that he negotiated the arrangements for representation of the company first with Cowen, then with Fitzgerald, but nevertheless, **he requested contracts from Mr. Mason**, plaintiff’s president, and received them, indi-

cating that he did not recognize Fitzgerald's authority to make a binding contract, but recognized him for the purpose of negotiating, merely. In this respect the case comes squarely within the decision in *Leavitt v. Dimmick*, 86 Ore. 278, where the court held that such an incident charged the person dealing with the agent with notice of the limitation of the agent's authority, and precluded the person dealing with the agent from relying upon anything except express authority.

We respectfully submit that the evidence referred to, documentary as well as the oral, given by Fitzgerald, Mason, and Munnell and Sherrill, is of such a character that defendants can no more say that they did not know of the limitation of Fitzgerald's authority than a man can say that he did not see an approaching train while looking in the direction from which it came with nothing to obstruct his view.

The record establishes that defendants had knowledge of the limitation of Fitzgerald's authority and there is no evidence in the record tending to establish the contrary, hence no issue was presented in that respect. Under the view of the law as adopted by the court, defendants could not recover on **implied or apparent** authority if they had knowledge of the limitation, and since there was no proof of any **express** authority, the motion for a directed verdict should have been granted, and the verdict rendered is not supported by the evidence.

II.

None of the affirmative defenses or denials in defendants' answer present any issue as to the quality or character of the merchandise sold by plaintiff to defendants which would permit the introduction of evidence to the effect that the merchandise sold by plaintiff to defendants was of defective quality and that defendants sustained loss by reason thereof; nor is any issue presented by the pleadings upon which any such evidence would be relevant. The defenses are merely claims for credits based upon agreements alleged to have been made by defendants with plaintiff's agent. These agreements, however, did not in any way involve the question of the quality of the merchandise.

Nevertheless, in the opening statement to the jury, defendants' counsel stated to the jury at great length:

"That the defendants would establish that the plaintiff delivered to the defendants tires that were of **defective and inferior material and unsalable**; that the defendants had resold some of the tires and tubes to their customers and the said **customers returned the said merchandise because of the defective and inferior condition** and refused to pay defendants therefor, and that as a result thereof, the **defendants suffered loss of a great deal of trade and loss of profits from the said sale and that this condition caused defendants considerable financial embarrassment and difficulty.**"

(Bill of Exceptions, p. 37.)

Plaintiff objected to the statement on the ground that the pleadings did not present any issue as to the quality and character of the merchandise, and that evidence in support of the statement of counsel to the jury would be immaterial. (Bill of Exceptions, p. 38.) The trial court, however, stated, "Let him state his case." Plaintiff thereupon saved an exception to the statement and ruling. (Bill of Exceptions, p. 38.)

Notwithstanding the fact that no issue was presented by the pleadings under which the quality of merchandise would be presented, defendants' counsel for the SECOND time brought the same matter to the attention of the jury during the direct examination of the defendant Sherrill. Referring to a letter, counsel asked the witness:

"Q. This is his letter about the **quality be-
in maintained**, what is the fact about that?

Mr. BISCHOFF: Objected to; no issue raised in the pleadings about any defect in the quality.

Mr. LILJEQVIST: It may become material later on.

COURT: Nothing in the pleadings about the **quality of the tires.**" (Trans. p. 75.)

This objection and ruling of the court brought to the attention of defendants' counsel the attitude of the court in reference to defendants' attempt to inject into the case any reference to the quality and character of the merchandise, and defendants' counsel was bound to know and did know at that point

that no such evidence would be permitted by the court. Indeed, counsel for defendant was bound to know without objection of plaintiff and ruling by the court that such evidence would not be admissible under the pleadings, but after the ruling of the court at that point there certainly could be no justification or excuse for again bringing to the attention of the jury the same objectionable matter.

Nevertheless defendants' counsel for the THIRD time brought this matter to the attention of the jury during Sherrill's examination in the following manner:

"Q. Just right here, before you go any further. What is the fact at that time as to whether **your dealers had returned stock to you and whether your dealers refused to do any business with you with reference to the Mohawk line?**

COURT: I don't think that is important in this case; unless coupled up with some agreement it would not be important.

Mr. LILJEQVIST: One reason why they were willing to surrender the line.

COURT: It doesn't make any difference why they were willing to surrender, the question is whether they did surrender." (Trans. pp. 90-91.)

The question referred to above was highly improper for two reasons: FIRST, because it was put in the face of the former ruling of the court, and SECOND, because the question was purposely

put in a leading form incorporating into the question the very information which counsel was bound to know and did know the court would not permit the witness to give to the jury, and hence we find counsel conveying to the jury information that dealers had returned merchandise and had refused to do any business with defendants. The purpose of this question becomes apparent when considered in the light of the preceding attempts to bring the same subject to the attention of the jury.

Defendants' counsel brought to the attention of the jury the same subject for the FOURTH time during the examination of Mr. Miles, one of the defendants' customers, as follows:

"Q. How long did you handle the Mohawk line?

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial. I don't see what his arrangement has to do with it.

Mr. LILJEQVIST: They have offered a lot of letters here that they have introduced, talking about the arrangements, attempting to show that Munnell & Sherrill got into financial slowness in payment of certain bills. They have offered a lot of evidence about the Clark & Miles account, themselves. Now, that being true, they have brought out that transaction. They are apparently attempting to show that the Mohawk Company in this case were very philanthropic towards Munnell & Sherrill in carrying their account from a certain period to

a certain period; that due to the kindness of this company in failing to press the payment of certain notes, things went wrong. That is kind of the impression that you gather from that, in reference to the Clark & Miles transaction that they brought out, the \$10,000 deal that they brought out, and these letters in reference to it, and different things which they ask to have the jury believe that we were in the wrong and they in the right. We wish to show that when we took this line we naturally relied upon the fact that these were good, and we unfortunately happened to get at the time these tires were not good. We are not saying anything against the Mohawk line at present because they did change their line about that time.

Mr. BISCHOFF: I object to a volunteered statement of that kind. There is nothing in the evidence to support it.

COURT: I don't think either of you have much effect on the jury on statements made outside of the record. The jury will decide this case on the evidence.

Mr. LILJEQVIST: We offer to show by this witness that this \$10,000 lot which he bought from Munnell & Sherrill which has been referred to—the reason he wasn't able to sell this line was because the tires didn't stand up to the guaranty. People to whom he sold them returned them to him, claiming they were no

good. He was losing customers, and he returned the stocks to him and had a lot of difficulty over these tires. This man was one of the biggest dealers in the state of Oregon handling these tires.

COURT: What has that to do with this case?

Mr. LILJEQVIST: I want to meet what they brought out.

COURT: The case is to be tried on the issues made here, and written contract between defendant and plaintiff, whether entitled to a rebate, or whether entitled to credit for the return of the tires.

Mr. LILJEQVIST: But if they seek to draw the inference from this state of facts, that we were in default, we wish to show the default was not our fault, because **we couldn't sell the tires on account of the quality being bad.**

COURT: As I understand the pleadings, there is no question of defects. They haven't set up any defense that the tires were not up to standard, or that you lost money on it on account of defective tires.

Mr. LILJEQVIST: **I wish to show by this witness and ten other witnesses—to prove defective tires.**

COURT: Prove something wholly outside of the issues in the case.

Mr. LILJEQVIST: To meet the testimony they have offered.

COURT: They haven't offered testimony to that effect. I think we will confine the investigation to the issues in the case, and not go outside.

Exception saved.

Mr. BISCHOFF: I want to assign as misconduct the remarks of counsel upon questions not presented by the issues, entirely foreign, and made for the purpose of reaching the jury on an extraneous matter.

COURT: You have your exception.

Mr. BISCHOFF: I want to assign as misconduct in referring to questions of that kind wherein he went outside of the record entirely.

COURT: I don't think counsel on either side should make that kind of a record of that kind of a statement. Counsel was probably mistaken in the view the Court has of the issues in the case." (Trans. pp. 269-272.)

If the court will for a moment reexamine the question which brought out this long speech and argument on the part of defendants' counsel it will at once be apparent that there was nothing in the question, or plaintiff's objection thereto, which furnished any excuse or justification for the verbose statement that followed, nor for entering into a long discussion as to the quality of the tires. Counsel took the occasion at that time without any justification therefor, and in face of the repeated rulings of the court, to argue to the jury, by means of this argument on the objection to the question, the

very information which counsel then knew beyond question the court would not permit to go to the jury. The misconduct at that time had become so flagrant and the intention of counsel to bring the same subject to the attention of the jury had become so pronounced, that plaintiff's counsel had to take the precaution to spread upon the record notice that this practice would be regarded as misconduct. The discussion speaks for itself and its purpose must be manifest from a bare reading of the statement.

Defendants' counsel brought the same subject to the attention of the jury for the FIFTH time (Trans. pp. 299-300) where the following took place:

"Q. (Mr. LILJEQVIST) Do you know what the **trouble** was as explained in this letter to them, and will you say whether you ever took this up with the factory?

A. Yes.

Mr. BISCHOFF: I don't see the materiality of Clarke & Miles, the complaint they were not able to use them. I don't see that has reference to any issue here.

COURT: I don't think it has any materiality here; it occurred long prior to this settlement.

Q. Those letters you wrote to them in reference to having tires on hand and which are referred to, **where they note the condition**, will you state without going into detail just what the situation was? **Just what the reason was you had accumulated this stock of tires?**

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial, occurring long purior to the settlement of December 2, 1920, and the condition couldn't possibly affect the issues raised by the pleadings.

COURT: What do you claim for it?

Mr. LILJEQVIST: The correspondence, the course of correspondence—

COURT: I don't see what the correspondence has to do with this case prior to the settlement in 1920 when the notes were given.”
(Trans. pp. 299-300.)

Here again we have a thinly veiled attempt to bring the matter of defective condition of tires to the attention of the jury, and we find counsel again incorporating the information in the questions, knowing that the court would not permit such evidence to be introduced. Thus we find him injecting into his question such statements as “Do you know what the trouble was?” and “Where they note the condition,” both of which were intended and did carry to the jury the same information that defendants' counsel had so persistently brought to its attention.

Defendants' counsel brought the same subject to the attention of the jury for the SIXTH time when he offered in evidence the letter of December 31st, 1920, which necessitated interposing an objection, bringing to the attention of the jury the same subject. (Trans. p. 309.)

The same subject was referred to for the SEVENTH time (Trans. pp. 406-409) during the examination of Mr. Munnell, at which time defendants' counsel again took occasion to enter into a long speech on the subject of the quality of the tires, as follows:

"Q. You said you had on hand. Will you state approximately how much of that was stock that came back to you, which you were unable to turn over in these two orders that have been referred to, the \$10,000 one to the tire company here in Portland, and the other \$10,000 worth to Miles & Clark of The Dalles?

Mr. BISCHOFF: Objected to as incompetent, irrelevant and immaterial; nothing whatever to do with any issue raised in the pleadings.

Mr. LILJEQVIST: I have a further point I want to present to the court in reference to this. They are disputing that they had any agreement with us to cover our rebate on these tires we kept in December when we gave the notes. They are denying it, we affirm it. That is a question for the jury to decide. Now it seems to me that if the fact should have been that we bought a lot of tires from them upon a guarantee of quality and a guarantee of price, and the guaranty of what these tires would do—we invested nearly \$30,000 in these tires,—and they didn't conform, we would have had,

beyond any question, a cause of action, in my judgment, in reference to the quality of the goods sold, in such a state of facts.

Mr. BISCHOFF: Why didn't you—

Mr. LILJEQVIST: Hold on. That being true, when they came up here—certainly if there was a lot of trouble with the tires in reference to quality, etc., if we were unable to sell \$20,000 worth of that stock we would have sold if the tires had been right, it is certainly competent evidence upon the proposition if this company were under a moral obligation, let alone a legal obligation, at the time we made this agreement with them to give them the notes, and they should give us the benefit of the price decline. In other words, the situation between the parties, they are attempting to claim they had no authority to make such an agreement, and didn't make such an agreement. Here we had the stock, a lot of tires which, if they hadn't come through according to their guaranty of quality, etc., we would have the situation in which we would have a legal remedy if we couldn't settle and we did settle on a proposition to give the notes, and they agreed with us that we would get the price later on, and get it and sell stuff if we were able to sell it, and on such stock as we should keep, we should have the benefit of the price decline later on. It seems to me simply one of the elements of fact. I don't see why we should

plead it. I don't expect to go into calling witnesses, since the ruling of the court, but it seems to me, now they are disputing any agreement of that kind, the situation of the parties at that time—we would certainly have the right to go into the situation of that kind if they make that attempt, and we had proof they had notice of it. In other words, it is all corroborative evidence. I don't want to take much time. I suggest that we can show that with much less trouble, and very briefly show our contention. I want to go into it and just show our contention.

COURT: Do you claim you had any such conversation with Mr. Fitzgerald?

Mr. LILJEQVIST: Our correspondence all shows.

COURT: At the time you claim the contract was made?

Mr. LILJEQVIST: We claim we made that contract. We didn't threaten to sue them.

COURT: As a part of the conversation with Fitzgerald, the quality of the tires was discussed?

Mr. LILJEQVIST: Whether it was discussed at that conversation or not, it was discussed. Letters had been written about it. One of the circumstances existing at the time of the settlement.

COURT: As I understand the pleadings,

there is simply three questions shown to be in dispute. A difference of \$137.32 rebate on the tires in November, 1921. You claim you are entitled to \$249 and the plaintiff gave you credit for \$111.68. That question is in dispute. The next question is the alleged agreement in June, 1921, by which the plaintiff agreed to settle a controversy or dispute you were having about the decline in prices, by cancelling one of the notes. And a third is the credit which you are entitled to, if any, for tires turned over to the American Tire & Rubber Company. Those are the three issues in the case, and I think the evidence should be directed to that.

Mr. BISCHOFF: I want to state in the record that I **again assign as misconduct** the lengthy statement of counsel with respect to defects in tires, made for the purpose of creating a prejudicial atmosphere. The matter has been ruled on on two or three occasions before. Counsel knew the ruling of the court, and his remarks I regard as having been made for that special purpose.

From the tenor of this outpouring it must be quite apparent that counsel was directing his remarks to the jury rather than to the court, for he knew by that time that such argument would not be pertinent in support of the question which was objected to, that the court would not reverse the ruling which it had previously made whenever the same subject was referred to.

The same subject was brought to the attention of the jury for the EIGHTH time at the conclusion of Munnell's examination, when the following took place (Trans. p. 446);

"Q. One question. I want to ask, during this time you were having this trouble with this old account, I want you to state to the jury what is the fact with reference to whether you lost all the dealers that you had—whether you were able to retain them or not?

Mr. BISCHOFF: That is objected to, may it please the court.

COURT: What has that to do with the case? The court has repeatedly stated there is no issue in this case except what is set out in the answer. Confine your testimony to that. The issues are perfectly simple as far as the answer is concerned, and that is the issue we are to try."

It must be apparent that the **repeated efforts** to bring to the attention of the jury the subject of defective quality of tires and that defendants suffered loss by reason thereof, was bound to be prejudicial to the plaintiff. It is true that the **plaintiff's objection** was sustained in each instance and that on one or two occasions the court made the statement that such statements would be disregarded by the jury, but it is well known and **recognized** by courts that the effect of such repeated references are bound to and do have a prejudicial effect. **Experience has taught and the courts have recognized that jurors**

are incapable of freeing their minds from prejudicial references made during the course of the trial, and that they are bound to influence the determinations, even in cases where the trial court has specifically directed the jury to disregard such testimony. The information that tires were defective and that defendants suffered loss by reason thereof was **calculated to and bound to produce** a feeling of sympathy for the defendants and of prejudice against the plaintiffs, which no amount of caution on the part of the trial court could dispel.

We charge that this **information was deliberately brought to the attention of the jury**, and there can be no other conclusion to be drawn from the course of conduct pursued by defendants' counsel. There is not the slightest excuse in the record for the reference to these matters. The **pleadings** are so **barren** of any reference to these matters that it **can not be said that counsel has mistaken the scope of the issues**. While the first and second references might have been excused, overlooked, or minimized on one ground or another, there certainly could be **no excuse for the repetition** or the lengthy arguments indulged in by the defendants' counsel **after the court had ruled** on the matter adversely on a number of occasions. After that situation, the subsequent attempts to bring this matter to the attention of the jury must be regarded as having been willfully and deliberately made for the purpose of influencing the jury. The necessity for the repeated objections and the rulings of the court thereon only

served to emphasize the matter, and the layman sitting as a juror was bound to form the conclusion that a situation in fact existed which the plaintiff was exceedingly anxious to have withheld from the knowledge of the jury, which if disclosed would be detrimental to plaintiff. As was said in *Chicago City R. R. Co. v. Gregory*, 6 A. & E. Ann. Cas. 221-223, 221 Ill. 591:

“The question here is whether a party will be permitted by **indirect means** to acquaint a jury with facts which he is not allowed to bring to their attention by direct proof.

In *Scripps v. Reilly*, 38 Mich. 10, the Supreme Court of Michigan, in holding that **repeated offers of proof of incompetent matter** might be cause for reversal, said:

‘Everything having a tendency to prejudice or influence a jury in their deliberations which is not lawfully admissible in evidence on the trial of the cause should be, so far as possible, kept from coming to their knowledge during the trial. **An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him** when he retires to deliberate upon the verdict to be given, and no matter how honest or conscientious he may be or how carefully (599) he may have been instructed by the court to not permit such incompetent matter to influence him or to have any bearing in the case, it will be difficult, if not impossible, for him to separate the competent

from the incompetent, or to show to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. But whatever the reason for the rule may be, all courts agree in excluding incompetent testimony, and that an error in this respect will be sufficient cause for reversal. This rule would be but slight protection if counsel or witness could be permitted to make a statement, but not under oath, of the incompetent testimony, or counsel state same fully to the jury, in their argument or otherwise. The essence of the wrong consists in the fact that such incompetent testimony is brought to the attention of the jury, more than in the method adopted in communicating the fact. No matter how the information is obtained, the result is the same.' ”

The cases in which such conduct has been discussed and condemned are numerous. The following case is typical of the manner in which the courts deal with this subject.

In *Louisville R. R. Co. v. Payne*, 19 A. & E. Ann. Cas. 294, 133 Ky. 539, the court held:

“The misconduct of counsel complained of in this case was the **repeated asking of incompetent questions** over the objection of counsel for defendant, and **in the face of the rulings of the court that such questions were incompetent.** Counsel for plaintiff attempted to establish that

the servants in charge of defendant's trains on other occasions had been guilty of acts of negligence similar in character to that for which a recovery was sought in this case. This the court held to be incompetent; but, in spite of his ruling to this effect, counsel for plaintiff persisted in pursuing this line of interrogation almost to the point of exasperation. To each new question bearing upon the same subject counsel for defendant would object, and the objection was promptly sustained and an exception taken, and the question immediately asked in another form with the same result. These questions were incompetent, and the line of interrogation attempted to be pursued wholly improper; and, when the trial court had so decided and ruled, counsel for plaintiff should have desisted in his efforts to bring the matter before the jury. Of course a large discretion is allowed an attorney in presenting his case, and so long as it does not appear that he is knowingly and intentionally violating the rules of practice in the introduction of evidence, or otherwise, the fact that he does (544) so will furnish no ground of complaint to opposing counsel, where the error is corrected by the court; but in a case like that here presented, where counsel persistently pursues a line of interrogation which the court rules to be wrong, and which one reasonably well acquainted with the rules governing the admission of evidence must know to be im-

proper, the **conclusion is irresistible that it is done for the purpose of influencing and prejudicing the mind of the jury in arriving at a verdict.** No court should countenance such conduct; and when the trial judge, because of his kindness of heart, or long-suffering and forbearing nature, permits it to go unpunished, there remains nothing to do but deprive the one offending of the fruits of his victory thus earned. **This case must be reversed for other reasons; but if there were none such, this misconduct upon the part of plaintiff's counsel would furnish abundant grounds for reversal.**

Where the record shows that an attorney persistently and dogmatically pursues a line of interrogation over the objection of opposing counsel and the adverse ruling of the court to the extent here shown, the conclusion is irresistible that such was not due to error of judgment, but in pursuance of a determination to present the matters about which the questions are asked to the jury in spite of court and counsel. Such conduct should neither be tolerated nor excused by the trial court, and no litigant should be permitted to profit by such practice.

In the case of *Louisville, etc. R. Co. v. Reaume*, 128 Ky. 90, 107 S.W. 290, it was expressly held to be a reversible error to repeatedly and persistently ask incompetent questions. And in the case of *Marcum v. Hargis*, 104 S.W. 693, 31 Ky. L. Rep. 1117, this court

held that, where a line of questions had been ruled to be incompetent, the trial court did not err in requiring counsel, before he would permit the question to be asked, to first submit it to him, not in the hearing of the jury, in order that he might determine its competency before he would permit it to be asked. The reason for the rule is apparent. Where an incompetent question is asked, opposing counsel must either permit it to be answered or enter his objection; and although the trial court refuses to permit the question to be answered, the very fact that the same question in a different form is repeatedly asked, and a vigorous objection interposed to its answer, emphasizes its importance in the minds of the jury, and necessarily prejudices the case, and for **this reason, if for no other**, where this practice is pursued to the extent indicated in the record in this case, the judgment should be reversed."

In *Cleveland R. R. Co. v. Pritschaw*, 100 A. S. R. 682-687, 69 Ohio St. 438, the court held:

"The repetition of incompetent inquiries, to which objection had been sustained, was for the obvious purpose of **eliciting a repetition of the objection** and to prejudice the case in the estimation of the jury. It should need no comment to show that the purpose which prompted such conduct called for its complete and immediate suppression."

In *People v. Derbert*, 71 Pac. 464, in reversing a verdict of guilty in a criminal case, the court held:

“The court promptly sustained objections to all these questions, but that did not cure the error. It clearly appears that the object of the district attorney was to leave the impression upon the mind of the jury that defendant had committed other crimes, and that he had changed his name. His questions were directly in face of the rulings of the court, and certainly, with the knowledge that the court would not permit them to be answered. The object was to ask the questions and not to get the answers.”

In *Chicago R. R. Co. v. Mines*, 77 N.E. 898, the court held:

“The action of counsel in conveying to the jury, by **suggestive interrogatories**, the very information which the court had held the jury should not have, was improper.”

The entire subject of misconduct of counsel is dealt with at length in the exhaustive notes to be found in 6 A. & E. Ann. Cas. 224; 19 A. & E. Ann. Cas. 296; Ann. Cas. 1917 A, 441. And it seems to be well established that a new trial must be granted for misconduct of the character presented by the record in this case.

In a California case referred to in the notes, *People v. Mullings*, 23 Pac. 229, 83 Cal. 38, the court said:

“To say that such a course would not be prejudicial to defendants is to ignore human experience and the dictates of common sense.”

We respectfully submit that the conduct of the defendants' counsel is subject to the criticism made in all of the cases referred to, for he brought up the subject when there was no issue in the pleadings and then persisted in bringing the matter to the attention of the jury on numerous occasions after the court had held that such testimony was inadmissible, and even after plaintiff's counsel gave notice upon the record that the attempts were regarded as misconduct. It cannot be said in this case that this repeated reference to the defective quality of the merchandise and that defendants suffered injury therefrom, did not have its effect upon the minds of the jurors, especially in view of the fact that the jury did not even award plaintiff the amount which the pleadings admitted was due to plaintiff.

Plaintiff made a motion for a new trial on the ground of this misconduct, and the refusal to grant the new trial is assigned as error (Assignments of Error, p. 546.)

III.

If this court adopts the view that a verdict should have been directed because there was no proof of express authority on the part of Fitzgerald to bind the plaintiff by such agreements as are set forth in defendants' answer, then the judg-

ment should be reversed, with directions to enter judgment for the plaintiff.

Respectfully submitted,

BEACH & SIMON and

S. J. BISCHOFF,

Attorneys for Plaintiff in Error.

No. 4122

United States
Circuit Court of Appeals
For the Ninth Circuit

THE MOHAWK RUBBER COMPANY,
of New York, Inc., a Corpora-
tion,
Plaintiff in Error,

vs.

EDGAR J. MUNNELL *and*
ARTHUR J. SHERRILL,
Individually and as co-part-
ners doing business under the
firm name and style of MUN-
NELL & SHERRILL,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

BEACH & SIMON, S. J. BISHOFF,
Attorneys for Plaintiff in Error.

W. M. CAKE, RALPH H. CAKE and L. A. LILJEQVIST,
Attorneys for Defendants in Error.

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- (a) Whether note of \$2633.36 dated Dec. 2, 1920, signed by defendants in error is discharged.
- (b) Whether defendants by delivery of tires in September, 1921, to American Tire & Rubber company became entitled to a credit of \$9814.20 on their indebtedness to plaintiff or only to \$1079.25 allowed by plaintiff.
- (c) Whether defendants by reason of the price decline of November 15, 1921, became entitled to a credit of \$249.44 on their indebtedness to plaintiff or only to \$111.68 allowed by plaintiff.

2. The determination of this controversy resolves itself into two questions:

- (a) Did the plaintiff through its agent, W. G. Fitzgerald, make the agreements which establish the three points above mentioned in favor of the defendants. Plaintiff insists that there is no evidence to show such agreements were made.
- (b) If he did make such agreements did he act under authority from his principal, the plaintiff, and or has his acts been ratified by the principal. Plaintiff insists that Fitzgerald had no such authority. It also claims that there could be and was no ratification of an agreement or agreements not made.

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United States
Circuit Court of Appeals
For the Ninth Circuit

THE MOHAWK RUBBER COMPANY,
of New York, Inc., a Corpora-
tion,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL *and*

ARTHUR J. SHERRILL,

Individually and as co-part-
ners doing business under the
firm name and style of MUN-
NELL & SHERRILL,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR
STATEMENT

Plaintiff sued defendant on three promissory notes each dated December 2, 1921, and being in the sum of \$2,633.26 each, due respectively February 10, 1922, April 10, 1922, and May 10, 1922; said notes being the subject of the first, second and third causes of action respectively in its complaint. The fourth cause of action is on an open account for goods sold on which plaintiff claimed a balance due of \$6,733.01. Interest is asked on the various sums and attorney fees on the note.

Defendants answered admitting execution of notes and amount of goods sold.

The first separate answer to the first cause of action alleges agreement for protection against price decline in tires and a credit to be given therefor on said decline. Also that exclusive agency held by defendants was by plaintiff given to American Tire & Rubber Company, and that at plaintiff's request and with its consent stock of tires held by defendants of agreed value of \$9,814.20 was turned over to said tire and rubber company, which, together with a rebate of \$249.44 on decline of November 15, 1921, was to be credited on sums represented by note in first and note in second causes of action and on open account stated in fourth cause of action, leaving a balance of \$387.40 due from defendants to plaintiff, which defendants tendered and brought into court.

The second separate answer to the second cause of action states the same matters and with tender constitute alleged defense to second cause of action.

The fourth separate answer to the fourth cause of action states the same matters and with tender constitute alleged defense to fourth cause of action.

The third separate answer to the third cause of action alleged agreement at time notes were signed and goods returned for unlimited price protection and credit agreement in event price was cut. That on May 12th, 1921, the price was cut, there being a decline in tires to the extent of 20%, and defendants became entitled to

a credit and they forwarded an inventory with a request for credit, and defendants agreed to give credit to the amount of the third note, and that the note mentioned in third cause of action should be deemed and treated as fully paid, satisfied and discharged.

Upon these issues the case went to trial.

When the evidence was submitted and both parties had rested, the plaintiff made a motion for directed verdict (Trans. p. 517) setting forth the following grounds:

1. That plaintiff has established a prima facie case, and that no issue had been raised by the evidence with respect to any material allegations of the complaint.

2. That the defendants have failed to establish by competent evidence any of the defenses set forth in their answer.

The case as made resolves itself into three subdivisions:

1. Whether by reason of a decline in tires announced May 10, 1921, it was agreed that the note set up in plaintiff's third cause of action should be treated as fully paid, satisfied and discharged.

2. Whether the tires turned over to the American Tire & Rubber Company in September, 1921, amounting to the sum of \$9,814.20, should be credited on the indebtedness of defendants to the plaintiff.

3. Whether the defendants should be given a credit in the sum of \$249.44 by reason of the decline announced on November 15, 1921, instead of the sum of \$111.68 allowed by plaintiff.

Plaintiff filed a motion for a new trial, alleging among other things insufficiency of the evidence to justify the verdict, (Trans. p. 531) and in its assignments of error claims that there is no evidence to show that its Pacific Coast Manager had authority to make and bind plaintiff by the contracts alleged in the answer; that there is no evidence in the record to establish the contracts alleged in the answers, and that there is a variance between the evidence and the contracts pleaded.

LEGAL PROPOSITIONS

I.

Agency and the authority of the agent may be proved by the testimony of agent on witness stand.

Hinton vs. Roethlar, 90 Ore. 440, 7; 177 Pac. 59.

Larkin vs. Carstens Packing Co., 80 Or. 104,
106; 156 Pac. 578.

II.

Agent has power to do all things *incidental* to the carrying out of his expressly authorized powers.

Bauer vs. Northwest Blow Pipe Co., 75 Or. 1, 6;
146 Pac. 129.

III.

The granting or the refusal to grant a new trial is within the sound discretion of the district court, and is not subject to review in the circuit court of appeals.

Goff vs. U. S., 281 Fed. 822, 823; C. C. A. 8th Cir.

Yellow Cab Co. vs. Earle, 275 Fed. 928, 930; id. (Cer. Den. 255 U. S. 624, 66 L. Ed. 797.

Greenburg vs. U. S., 285 Fed. 865, 866; id.

Slip Scharff Co. vs. W. M. Filene's Sons Co., 289 Fed. 641, 646; C. C. A. 1st Cir.

Adams Express Co. vs. Darden, 286 Fed. 61, 68, C. C. A. 6th Cir.

IV.

The assignment of error should be definite, it should show in what the alleged error consists, and the substance of what occurred at the trial which it is claimed constitutes error should be set forth. The court is not required to search the record.

Piper vs. Cashell, 122 Fed. 614, 618, C. C. A. 9th Cir.

S. S. Co. vs. U. S., 142 Fed. 315, 318, C. C. A. 8th Cir.

City of Grafton vs. Gentry Bros. Shows, 240 Fed. 646, 648, C. C. A. 4th Cir.

H. E. Winterton Gum Co. vs. Auto Sales Gum & Chocolate Co., 211 Fed. 614, 618, C. C. A. 6th Cir.

Cisco vs. Looper, 236 Fed. 336, 338, C. C. A. 8th Cir.

R. D. Cole Mfg. Co. vs. Mendenhall, 240 Fed. 641, 643, C. C. A. 4th Cir.

This rule is violated by the plaintiff in error.

V.

Rulings of the court are not reviewed unless excepted to, and the errors excepted to must be specified in the assignment of errors.

Ana Maria Sugar Co., Inc. vs. Quinones, 251 Fed. 499, 504, C. C. A. 1st Cir.

United Verde Extension Co. vs. Koso, 273 Fed. 369, 373, C. C. A. 9th Cir. (Aff. 254 U. S. 245, 251, 65 L. Ed. 246, 249.

Wear vs. Imperial Window Glass Co., 224 Fed. 60, 63, C. C. A. 8th Cir.

Goldfarb vs. Keener, 263 Fed. 357, 359, C. C. A. 2nd Cir.

Mound Coal Co. vs. Jeffrey Mfg. Co., 233 Fed. 913, 918, C. C. A. 4th Cir.

International Lumber Co. vs. U. S., 231 Fed. 873, 875, C. C. A. 8th Cir.

Netherlands American Steam Nav. Co. vs. Diamond, 128 Fed. 570, 574, C. C. A. 2nd Cir. (Syllabus 2.)

Chicago B. & Q. Ry. Co. vs. Frye Bruhn Co. 184 Fed. 15, 18, C. C. A. 8th Cir.

Skeele Coal Co. vs. Arnold, 200 Fed. 393, 395, C. C. A. 2nd Cir.

This rule is violated by the plaintiff in error.

VI.

Rule same in Oregon courts and according to Oregon practice.

Bagley Co. vs. International Harvester Co., 99 Or. 519, 524, 195 Pac. 348, 349.

Douglas Creditors Ass'n. vs. Hutcheson, 81 Or. 644, 645, 160 Pac. 539.

VII.

On the trial of the cause, the court sustained objections to the admission of testimony; an offer of proof was made and the matter argued to the court, defendant claiming that the evidence was admissible, and that the statements constitute error.

Defendant had a right to argue the admissibility of evidence to the court and it was *necessary* in order to preserve *their rights* to make an *offer of proof*.

Victor Talking Machine Co. vs. Straus, 280, Fed. 717, 718, C. C. A. 2nd Cir.

Sun Publishing Co. vs. Lake Erie Asphalt Block Co., 157 Fed. 80, 82, C. C. A. 8th Cir.

Camp Mfg. Co. vs. Beck, 283 Fed. 705, 6 C. C. A. 4th Cir.

VIII.

Under the Conformity Act, where it is necessary to

make an offer of proof in the State court, it is necessary to make it in the Federal court.

Shauer vs. Alterton, 151 U. S. 607, 616, 38 L. Ed. 288.

Buckstaff vs. Russell, 151 U. S. 626, 39 L. Ed. 292, 296.

Kansas City S. R. Co. vs. Jones, 241 U. S. 181, 2, 60 L. Ed. 943, 945.

IX.

Under practice in Oregon state courts it is necessary to make an offer of proof where an objection is sustained unless the question clearly indicates what the expected answer will be, which is not the situation in the case at bar.

Booth Kelley Lumber Co. vs. Williams, 95 Or. 476, 482-4, 188 Pac. 213, 215.

Hill vs. McCrow, 88 Or. 299, 309, 170 Pac. 307, 309.

Columbia Realty Investment Co. vs. Alameda Land Co., 87 Or. 277, 293-6, 168 Pac. 440.

Ashmun vs. Nichols, 92 Or. 223, 231, 178 Pac. 234, 236.

X.

Each error shall be *separately* stated in the assignment of errors, as well as particularly asserted.

Rule 11 of the Rules of this court.

Savage vs. U. S. 270 Fed. 14, 20, C. C. A. 8th Cir.

Davidson S. S. Co. vs. U. S., 143 Fed. 315, 318.
 Empire State Cattle Co. vs. Atchison T. & S. F.
 Ry. Co. 147 Fed. 457.

Smith vs. Hopkins, 120 Fed. 921, 923.

Herrington vs. U. S., 267 Fed. 77, 104 (8), C.
 C. A. 8th Cir.

Simpkins Federal Practice, (Rev. Ed.) p. 190.

This rule is violated by plaintiff in error.

XI.

It is well settled that on objection that there is a variance between the allegations of the pleading and the proof must be taken at the time the evidence *is offered*, otherwise it will be deemed to have been waived.

Preiss vs. Zitt, 148 Fed. 617, 618, C. C. A. 8th Cir., citing:

Nashua Savings Bank vs. Anglo Amer. Co.,
 189 U. S. 221, 231, 47 L. Ed. 782.

Roberts vs. Graham, 6 Wall. (U. S.) 578, 18
 Ed. 791.

Thompson Sterrett Co. vs. Fitzgerald, 149 Fed.
 721, 723, C. C. A. 7th Cir.

Phoenix Securities Co. vs. Dittmar, 224 Fed. 892,
 895-6, C. C. A. 9th Cir.

Twin City Fire Ins. Co. vs. Stockmen's National
 Bank, 261 Fed. 470, 474, C. C. A. 9th Cir.

XII.

A pleading is aided by the verdict where the pleading is not attacked by demurrer or otherwise in the court below.

Duluth R. R. Co. vs. Speaks, 204 Fed. 573, 576,
C. C. A. 8th Cir.

XIII.

A motion for a directed verdict *admits the truth* of the evidence given by the party against whom it is directed.

Sherman Clay vs. Buffman & Pendleton, 91 Or.
352, 360, 179 Pac. 352.

XIV.

Unless the party against whom the motion for a directed verdict is made is *wholly without a cause of action or defense*, the omission of a material allegation from a pleading does not assist the motion. If the evidence, *accompanied by a good pleading*, is sufficient to establish the cause of action or defense, (if believed by the jury), a motion for a directed verdict should be denied. Under the verdict herein appellant cannot urge that the evidence does not establish the averments of the answer.

Ridley vs. Portland Taxicab Co., 90 Or. 529,
533-5, 177 Pac. 429, 430-1.

Emmons vs. Southern Pacific Co., 97 Or. 263,

295, 191 Pac. 333, 343.

Parks vs. Keeney, 105 Or. 277, 279, 209 Pac. 497 (in which case there was no action stated at all, the exception therefore being revoked).

XV.

In Oregon courts, the court is without power to take a case from the jury, or to set aside a verdict of a jury if there is *any evidence*, however weak in probative value, to support the verdict.

Article VII, Section 3c, Oregon Constitution.

Kahn vs. Home Tel. & Tel. Co., 78 Or. 308, 317, 152 Pac. 240, 242.

Reed vs. National Hospital Assn. 106 Ore. 471, 482, 212 Pac. 537, 541 (3).

Southern Oregon Orchards Co. vs. Bakke, 106 Or. 20, 25, 210 Pac. 858, 860 (1).

Mitchell vs. S. P. Co., 105 Or. 310, 317, 209 Pac. 718, 720 (4).

Derrick vs. Portland Eye, Ear, Nose & Throat Hospital, 105 Ore. 90, 98 (4), 209 Pac. 344, 347 (4).

Doherty vs. Hazelwood Co., 90 Or. 475, 478, 175 Pac. 849.

XVI.

On writ of error the court is not concerned with the *weight* of the evidence.

Toledo St. L. & W. R. Co. vs. Howell, 191 Fed.

776, 780, C. C. A. 6th Cir.

XVII

If the statutory rule in the Oregon courts will not be applied to the verdict in a federal court, yet this court will invoke the rule of the Federal courts, which are not applying the rule of the state courts, that the court must consider the evidence most favorably on a motion for a directed verdict; and it is *only* when *all* honest men, in the honest exercise of a fair, impartial judgment, would draw the *same* conclusions from the facts which condition the issue, that it is the duty of the court to withdraw that question from the jury.

Hobbs vs. Kiser, 236 Fed. 681, 682, C. C. A. 8th Cir. Citing numerous authorities from the supreme court and lower federal courts.

In this case the trial judge did not hesitate at all in finding that the evidence required the submission of the case to the jury.

XVIII.

The jury's findings on conflicting evidence is conclusive.

Hobbs vs. Kiser, *supra*, p. 685.

XIX.

This conclusion becomes practically *conclusive* in view of the fact that appellant was entirely satisfied with

the court's charge to the jury, and made no objection and saved no exception to any portion thereof. The court instructed the jury as favorably to the appellant as the law and facts required.

Carolina C. & O. Co. vs. Stroup, 239 Fed. 75, 79,
C. C. A. 6th Cir.

XX.

A principal cannot ratify a part of an alleged unauthorized contract without ratifying the whole; a principal cannot accept the benefits without bearing the burdens.

Bauer vs. N. W. Blow Pipe Co., 75 Or. 1, 5, 146
Pac. 129, 139 (1-4), citing cases.

Depot Realty Syndicate vs. Enterprise Brewing Co., 87 Ore. 560, 575 (7), 171 Pac. 223, 224, (2), citing authorities.

XXI.

It is good pleading to allege that an act was done by the principal and it is competent to prove that averment by showing that the act was merely done by the agent of the principal thereunto duly authorized, or that it was afterwards ratified by the principal.

Marsters vs. Walker, 89 Or. 526, 529 (2), citing cases.

Hinton vs. Roethler, 90 Or. 440, 448; 177 Pac. 59, 61 (4).

Scandinavian National Bank vs. Wentworth
Lumber Co., 101 Ore. 151, 157; 199 Pac. 624,
626 (5).

ARGUMENT

In view of the motion for directed verdict and the assignments of error in reference to insufficiency of evidence, we deem it advisable to analyze the testimony submitted by the defendants, and also call attention to some of the evidence of plaintiff, which we claim supports the position taken by the defendants.

ANALYSIS OF EVIDENCE

Mohawk Rubber Company was a manufacturer of automobile tires, and for a considerable period prior to June 19, 1919, the defendants, who were distributors of tires, had had business relations with the manufacturers. (Trans. p. 403.)

Business relations prior to December 2, 1920—The parties, in the spring of 1919, undertook to get the arrangement upon a more definite basis. (Trans. p. 403.) A conversation was had with Mr. Fitzgerald, and the plaintiff wrote a letter, dated June 18, 1919, to the defendants (plaintiff's Exhibit F), under which the plaintiff turned over to the defendant as distributors the State of Oregon and certain territory in Washington and Idaho. It was also conditioned that the defendants open a retail store in Portland to sell Mohawk tires. The agreement was to expire by limitation on September

1, 1919, but could be renewed by mutual agreement in writing. No written agreement of renewal was ever made, and from September 1, 1919, on the contract between the parties must be ascertained from the correspondence and the understandings and agreements entered into between the plaintiff and the defendants, or their respective agents. The negotiations between the two parties naturally divide themselves into two periods, the first period preceding December 2, 1920, the second period being subsequent to that date. The plaintiff and defendants offered in evidence a large number of letters and telegrams, and it is necessary in the consideration of this case for the court to keep in mind the dates of these letters and telegrams and the situation before and after December 2, 1920.

Plaintiff's Exhibits F to Z inclusive, AA to MM inclusive, and defendants Exhibits 1, 17 to 28 inclusive, all relate to the business situation as it existed before December 2, 1920, when the promissory notes sued upon in this case were made.

With reference to the conditions as they existed before December 2, 1920, as shown by the correspondence, the court should read the exhibits in the order that the various letters and telegrams were sent by the respective parties, that order being as follows:

Plaintiff's Exhibits F, G, H, I, J, K, L, M, N, R, defendants' Exhibits 17, 18, 19, 20, plaintiff's Exhibit O, defendants' Exhibit 21, plaintiff's Exhibits P, Q, R, S, T, U, V, defendants' Exhibit 22, plaintiff's Exhibit W,

defendants' Exhibit 23, plaintiff's Exhibits X, Y, Z, defendants' Exhibit 24, plaintiff's Exhibits AA, BB, defendants' Exhibit 25, plaintiff's Exhibit CC, defendants' Exhibit 26, plaintiff's Exhibit DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, defendants' Exhibits 1, 27, 28.

This correspondence shows that the defendants, who undertook to act as distributors for the plaintiff, purchased a large amount of tires involving a considerable sum of money. Several conditions contributed in making it difficult for the defendants to take care of the account existing between it and the plaintiff. These conditions were a gasoline shortage, which occurred during the year 1920, bad weather conditions, the rainy weather having started in October, and raining continually for many weeks, rumors that other tire companies were going to reduce the price, which stopped a buying, and difficulties which the defendants had with *its dealers* in keeping the tires sold. These elements will be noted more fully in the testimony.

Plaintiff's Exhibits G and H show that the defendants sold about \$10,000.00 worth of tires to Clark & Mills; the tires did not stay put and were returned to defendants.

Plaintiff's Exhibit K seeks to show its philanthropy in that it sent these tires to the defendants at the old price. The record shows that the tire companies had the habit at stated intervals of raising or lowering the price of tires.

Munnell and Sherrill, as distributors, had been working for some time to line up Clark and Mills at The Dalles, and also to get them to open a retail store in Portland. These negotiations were known to Fitzgerald, the Pacific Coast Manager, and negotiations were consummated as to The Dalles territory shortly after plaintiff announced a raise in its price, and the plaintiff requested that this \$10,000.00 order should go in at the old list.

The conditions which the defendants faced, and which caused a large amount of tires to accumulate in its possession, and which it was unable to sell, are reflected in the testimony in the exhibits on the following pages of the transcript:

Exhibit O, (page 143), Exhibit P, (page 145), Exhibit 21, (page 297), Exhibit S, (page 151, second paragraph.) Exhibit V, (page 157). Though the plaintiff states that the reason for the trouble in a *majority of the cases* is not with the tires, it would indicate that in something *less than 50%* of the cases that the trouble was with the tires.

In reference to the tires sold to Miles & Clark, Sherrill testifies:

“We had to take them back, yes.” (Trans. p. 136.)

Exhibit YY, (page 223, second paragraph), Exhibit YY, (page 224, fourth paragraph), Exhibit 21, (page 297), the testimony reflects to some extent the

conditions faced by the defendants and which caused the accumulation of tires in its hands.

In Exhibit 17, (Trans. p. 291), in a letter dated June 2, 1920, defendants state that the tire condition is bad, the gasoline shortage has scared the dealers away and cut down local consumption, every day brings hard luck stories from the dealers who still have stocks on hand, and in some cases, service stations have closed entirely; that defendants have been forced to give a longer discount than that covered on account of similar policy of the company when they worked defendants' territory direct from the factory.

Exhibit 19, (Trans. p. 295), letter dated June 23, 1920, defendants state that business is simply shot to pieces, they have had to take back most of the tires they sold on account of customers being unable to meet their payments.

Exhibit O, (Trans. p. 143), dated June 26, 1920, defendants state that they have been receiving more tires back from their customers during the past thirty days than they have sent out and find themselves loaded to the guards with stock. They state that they must have sufficient time to dispose of the tires, or have them taken off their hands, as there is no tire business in defendants' territory.

Exhibit 21, (Trans. p. 297), dated June 29, 1920, enclosed a letter from Miles & Clark stating that they have

had poor luck with the tires they have used on their own machine so far. Defendants also state they are having a pretty tough time with the tire line, the usual state of affairs is reversed, they are now receiving 85% of the tires back instead of having the amount stay sold, and they are now confronted with a situation like that of Miles & Clark, "who have several thousand dollars worth of tires, most of them unpaid for, and who are likely, with the advent of defective tires to return their stock any day"; that the situation is so bad they have found it advisable to take the tires back rather than extend additional credits, as it is advisable to have the tires in the stores rather than doubtful accounts with the dealers, that the factory must help out in the matter, either by an extension of credits or must relieve defendants of part of the stock.

Exhibit P, (Trans. p. 145), "More tires are coming back from the customers than we are sending out," and defendants are doing this rather than lose the tires as the country dealers are hard hit by the conditions.

Exhibit Q, (Trans. p. 147). Fitzgerald refers this matter to the factory.

Exhibit T, (Trans. p. 154), written from the home office July 8, 1920, plaintiff states: "We realize fully the conditions you are bucking up against right now, for *they are not peculiar to your section* of the country, but exist all over with greater or less extent." The letter states then that the conditions seem to be bettering.

Plaintiff's Exhibit U, (Trans. p. 157), dated July 15, 1920, shows that two trade acceptances maturing in August and September, amounting to \$4,908.17 each, were sent to defendants.

Exhibit V, (Trans. p. 157), dated August 27th, shows defendants were having hard work to collect the money to take care of the August trade acceptance, stating, "Have more tires in stock than 60 days ago account returns from dealers, and prefer to return some stock to 'Frisco if acceptable."

Defendants' Exhibit 22, (Trans. p. 300), a telegram of September 29, 1920, to plaintiff is to the effect that when Fitzgerald was in Portland he promised to let defendants know what disposition to make of the tires that they wished to return, and they wished instructions as to where to send them.

Exhibit W, (Trans. p. 158), a letter of October 15, 1920, from defendants, confirming 'phone conversation, states the tires they desire to ship. Letter refers also to conditions being uncertain on account of decline rumors which has stopped the tire business all together, and that the return of the stock is the best way to reduce the open account.

Exhibit 23 (Trans. p. 302), a letter from defendants to the home office dated October 18, 1920, states there is nothing left to happen to the tire business; that when the gasoline situation eased up, instead of having the

usual fall weather it rained for six weeks, that some of the tire companies had been reducing on account of rumors of other reductions, they state they are corresponding with the 'Frisco branch for shipping instructions as to the over-supply of stock.

Plaintiff's Exhibit X, (Trans. p. 160), dated October 19, 1920, is in answer to plaintiff's Exhibit W. The letter states that they are sending their men after future business with spring dating terms for payment in March, April and May; that the matter of price protection is before the Federal Board of Trade and is subject to its decision. "At the present time our plan is to guarantee against price reduction up to and including May 10th."

Plaintiff's Exhibit Y, (Trans. p. 163), is a letter from the home office attempting to quiet apprehensions and other rumors of price declines. The letter also states: "So far as price guarantee is concerned we have always protected all goods on hand unsold purchased within 60 days of the price change. Whether that will continue will depend upon the Federal Trade Board."

Plaintiff's Exhibit Z, (Trans. p. 167), is a letter written by defendants October 21, 1920, explaining the situation and stating that unless they hear from the company they think it best to ship a large quantity of tires to plaintiff at San Francisco.

Plaintiff's Exhibit AA, (Trans. p. 169), a letter of October 30, 1920, from the plaintiff, stating that their

salesmen have begun to solicit spring dating orders and that the terms to the dealers will be one-third payment March 10th, one-third payment April 10th, one-third payment May 10th. The letter further states, "We are guaranteeing prices on spring datings up until May 10th," stating that this is subject to the action, however, of the Federal Committee of Trade Relations, that if the Committee withdraws price protection the company must abide by it. The letter states: "We would suggest that you have your salesmen start soliciting spring business at as early a date as possible, and you, of course, can extend to your dealers the same protection which we are giving you." Adding, to have the salesmen impress on the dealers that the price protection is contingent upon the action of the Federal Committee.

Exhibit 24, (Trans. p. 303), is a letter dated October 26th, 1920, to the defendants from the home office. This letter has some important statements in it, as it further tends to confirm to the contention of the defendants that under the agreement with the company they had a right to return the tires, and also is a recognition of the conditions which Munnell & Sherrill were facing, which were clearly not the fault of defendants. The letter states: "We are certainly sorry to hear that conditions, instead of improving this fall, have taken a turn for the worse. *There is a jinx on the tire business this year.* We still feel as we did a year ago when we told you we would rather have you keep the surplus stock which you have and take care of your account as you can than to have

you further put to the expense and trouble of returning a lot of tires to San Francisco.”

Exhibit 25, (Trans. p. 304), is a telegram from defendants to plaintiff, dated November 3rd, 1920, stating that defendants are ready to return sufficient tires to cover open account as agreed with Fitzgerald, but it is suggested to hold them for shipping instructions from factory. Defendants agree to warehouse the tires until plaintiff wishes them shipped, if necessary, to get accounts straightened. This is the same telegram offered in evidence as Exhibit CC, page 175. The answer to this telegram is Exhibit 26, (Trans. p. 305), directing the defendants to hold tires; that a letter follows. This is the same telegram as Exhibit DD (Trans. p. 176). The letter following the telegram is Exhibit EE (Trans. p. 176), dated November 4th. This letter explains that the company desires defendants to hold the tires and attempt to dispose of them, and that thereby the large expense incident to returning the tires for credit would be eliminated. The letter states that conditions are dull, but advises them to sell the tires at an attractive price and turn the tires into cash.

Exhibit FF, (Trans. p. 178), follows up the telegram of November 3rd.

In Exhibit BB (Trans. p. 174), dated November 1, 1920, the plaintiff states, “You probably know that we do not accept returned goods to offset current accounts or obligations incurred on the basis of a straight sale.”

Defendants, in answer to this telegram, wrote Exhibit GG, (Trans. p. 180), and referred to the fact that they had a very definite agreement with plaintiff under which they could sell tires at the old list, and could exchange such of their stock as they were long on; "We have gone ahead on this matter with assurance from you that we could return this stock. We believe that it is the only way out of it." They will warehouse the goods if desired.

Exhibit HH, (Trans. p. 183), is a telegram from defendants dated November 8, 1920, stating that there is no other recourse but to return the stock per original agreement with San Francisco; that the public is not interested in tires at any price. In answer to this, plaintiff sends a telegram on November 9, 1920, Exhibit 88, (Trans. p. 183), claiming defendants cannot return tires, that letters written by 'Frisco do not indicate any such agreement, notifies defendants that Fitzgerald will soon call.

The telegram was followed by a letter of the same date, Exhibit JJ, (Trans. p. 184), which claims that the correspondence from 'Frisco indicates no right to return goods.

On November 10, 1920, Fitzgerald writes a letter to the defendants, Exhibit KK, (Trans. p. 188), in which Fitzgerald states that the matter of returning stock for credit to offset the debits is up to the Credit Department at Akron. The letter further states: "You must not for-

get that the writer's authority with this company is limited to certain matters such as the selling of goods, *territorial arrangements, etc.*, but when it comes to credits, return of unsold merchandise, and things of that caliber, then you are dealing with our Credit Department, because after we have made a sale of goods then the matter passes out of our hands into those of the Credit Department at Akron. We have no authority to take action in matters pertaining to their department." He advises the defendants to go after business, stating that the Mohawk is one of the lines that has survived present year conditions, stating how one company at Fresno in the future will devote their efforts to *quality merchandise* and have selected Mohawks. Defendants are advised to retain any surplus stock that they have at present as they will need it sooner or later.

On November 10th defendants telegraphed to plaintiff, Exhibit LL, (Trans. p. 192) as follows: "Have no desire to return stock which will involve \$35000.00 but enough to reduce our open account and relieve us of an over-supply certain sizes. This is according to agreement with Fitzgerald, and we request quick action."

The Mohawk Company wired back on November 11th, Exhibit MM, (Trans. p. 193) as follows: "Have no record of agreement to accept additional sizes nor has Fitzgerald, as indicated by his recent letters to you, but cite our letter of November 9th." Advises them not to worry about reduced prices.

Under this condition of affairs and the controversy

as indicated, Fitzgerald made a trip to Portland as promised in his letters and as stated by the factory at Akron, and it is at this point that matters take shape which resulted in the controversy involved in this action. An adjustment was made, and we desire to show what that adjustment was.

During the trial of this suit evidence was introduced as to the accounts as shown by the books of the plaintiff and the books of the defendants. The account as shown by the ledger of the defendants is given on pages 396, 397 and 398 of the transcript. The account as shown by the books of the plaintiff is given on page 468 of the transcript. (Exhibit JJJ.) The credits as shown by the books of plaintiff are given on pages 43, 44, 45 and 46 of the transcript. (Exhibits A and B.)

Price Protection on Stock Retained December 2, 1920—On the trial of this case the defendants sought to establish that there was an agreement between the plaintiff and the defendants, which was made at the time the notes were executed and the goods returned, that plaintiff would protect defendants on the goods retained by them at that time against a future decline in price.

Plaintiff, after offering the deposition of Morris E. Mason, Vice-President and Sales Manager at Akron, called W. G. Fitzgerald, its Pacific Coast Manager, at San Francisco.

Fitzgerald testified that the first three credits shown

on Exhibit B, (Trans. p. 44) represented credits that defendants "had received prior to the time the notes were given," and were for merchandise returned. (Trans. p. 49.) He stated that the return of such goods was not part of the settlement that was had when the notes were given. He stated that the settlement was made between the defendants and the Akron office and not through Fitzgerald. (Trans. p. 50). That he did not arrange for the taking of the notes (Trans. p. 51); that the agreement was not placed with him at all. Q. "Was there any agreement made between you and them that they should give you these notes and return tires in settlement of the account?" A. "No." (Trans. p. 52.)

At first he was uncertain whether the notes were sent to the San Francisco Branch, but later testified: "These notes were sent direct to Akron but the tires were shipped to us at San Francisco. They were not part of the same agreement." (Trans. pp. 52 and 53). He stated his authority from his company is not in writing. (Trans. 54.) This witness seemingly in the beginning attempted to offset defendants' claim of a settlement at the time the notes were executed. He was then shown a telegram from his company to himself, which he had accidentally left with defendants. (Defendants' Exhibit 1, Trans. p. 57.)

The *letter of November 19 therein referred to* was not produced, though request had been made and notice served on defendants to produce same. This testimony corroborates defendants' testimony as to the agreement. We suggest that a failure to produce the letter was be-

cause its effect would be detrimental to plaintiff. The producing of this telegram at the trial had the wholesome effect of making the Pacific Coast Manager more cautious in his statements.

When Mr. Fitzgerald arrived in Portland, the matter which is the subject of the correspondence herein above noted, came to a head.

Arthur J. Sherrill testified:

“A. We had an arrangement with Mr. Fitzgerald to return stock to San Francisco, to take care of our debts, as we were over-stocked, and along in the fall Mr. Fitzgerald came to Portland and took the matter up with us about retaining these tires, telling us that in all probability we would need that stock in the spring.” (Trans. p. 59.) Mr. Sherrill also said:

“Mr. Fitzgerald said that no doubt we would need these tires in the spring. If we returned them to San Francisco we will have to go to the expense of sending them down there and bringing them back to Portland to use in our business in Portland the following year. So he—we decided in talking it over together—that the better way would be for us to leave these tires in Portland, and *so to make an entirely new deal*—we were to give him certain notes, or divide them up, as I recall it, in five different notes, and we were to retain the tires in Portland, with the exception of something like \$6,000 worth of tires which were to be shipped to San Francisco. That was the matter—the way the matter stood when Mr.

Fitzgerald left Portland. It was with the understanding that we were to execute these notes and send them to him and ship the tires to him, and retain the rest of the tires after we had shipped the \$6,000 worth to San Francisco." (Trans. p. 61).

Mr. Sherrill further testified:

"The matter of rebate or price protection came up at this time when we had this matter up with Mr. Fitzgerald, and I said to him, I said, 'Well, Bill, if we keep these tires and go out and take spring dating orders, what protection will we have?' And he said, 'You will have the same—the usual protection on spring dating orders, of course.' " (Trans. p. 66).

Sherrill explains what a spring dating order is:

"A spring dating order is an order that is taken in the fall or late winter, and enables the country merchant to buy his tires, have them delivered to him some time in December or January, and he pays for them in March, April or May, or April, May and June; there are different terms, but it is a dating order, and he is protected against price decline up to the period of his last dating month. For example, if he paid for his tires in May, he would be protected against price decline until May 10th, whatever the price may be. In other words, he is not taking any chances on the price of tires dropping and having to bear the decline. And in doing business as distributors we give our dealers that protection. We couldn't compete against factories unless we did, and we are

supposed to be in the same relative position as a factory branch, giving our country dealers the same protection that a factory branch would give them, and the same terms and prices. That was the conversation that came up when the settlement was made, and we were assured by Mr. Fitzgerald that naturally—to use his own words—naturally if you are going to sell tires to the dealers you must be protected.” (Trans. pp. 66-67.)

In answer to the following question:

“Then the tires you kept, state to the jury whether or not you had an agreement with Mr. Fitzgerald that you could go out and sell these to your dealers on spring dating terms, so that in case a price cut came the following spring, your dealers would get the benefit of that price cut, as well as yourself?” (Trans. p. 68.)

Mr. Sherrill answers:

“We had that agreement.” (Trans. p. 68.)

On cross-examination Mr. Sherrill testified with reference to the time Mr. Fitzgerald came to Portland in November, 1920, as follows:

“Well, we made a new deal regarding the tires we were to keep . . . Well, the arrangements were that we were to send back a certain number of tires, we were to keep a certain amount on spring dating terms, giving notes for the same with protection of spring dating orders. . . . In fact, the arrangement that we made we were

to return a certain amount of tires and keep a certain amount on, giving the five notes in payment for same with spring dating terms on these five notes." (Trans. pp. 194-5.)

Again he testified:

"We had protection on that order. . . . On that amount of goods, on those notes. We were protected against decline on those notes—on account of that merchandise." (Trans. p. 197.)

H. A. Auspach, former bookkeeper and general office man of the defendants, testified with reference to the arrangement made in December as follows:

"Q. Do you know of your own knowledge anything about what the understanding was with Mr. Fitzgerald in December when these notes were given and a bunch of tires were returned at the time of this settlement, in reference to the tires that you then had on hand?

"A. The tires that we then had on hand were to be kept in our stock and sold with spring dating terms." (Trans. p. 347.)

He further testified that the substance of what Mr. Fitzgerald told the defendants was that "on this particular stock that we retained we were to have the spring dating protection, and we in turn were to protect our dealers." (Trans. p. 347.)

He further testified:

“It was concluded at that time that we were to return certain stock to San Francisco and sign notes for the balance which we were to retain, and with the spring dating terms.” (Trans. p. 348.)

On cross-examination Mr. Auspach testified that Mr. Fitzgerald agreed to give defendants *absolute protection* against decline in prices on the goods retained. (Trans. pp. 379-80.)

Mr. Fitzgerald agreed, “The stock would be protected against decline for spring dating.” (Trans. p. 380.) “The agreement was we were to have protection on that stock and go out after the spring dating business.” (Trans. p. 381.)

An attempt on cross-examination to limit the guarantee to protection on only the goods sold to dealers called forth the following:

“There was some stock, perhaps, that wouldn’t be sold at the time. There was nothing said about any particular part of it being subject to rebate. . . . Well, the spring dating was protection they would have on that stock, on which they would go out after business—protect the dealer.” (Trans. p. 382.)

Edgar T. Munnell testified that when Mr. Fitzgerald came from San Francisco in November, defendants had about \$35,000 worth of Mohawk tires and tubes on hand. There was some correspondence with reference to the company advising them not to send any tires until

Fitzgerald came up. At that time he agreed to take a certain amount of tires back.

After the shipment, an inventory was taken on December 31, 1920, showing they had between \$26,000 and \$27,000 worth of tires on hand. (Trans. p. 405.)

A. J. Munnell testified as to the agreement made with Fitzgerald as follows:

“On this visit of Mr. Fitzgerald in November, 1920, he came up here to try to settle this matter of our overstock in tires, and taking care of the account. We had more tires than we knew what to do with, and wanted them to take them back. They evidently didn’t want to take them at San Francisco, and didn’t have any other place to take them, so they sent Mr. Fitzgerald up here, and we talked it over and he agreed to take a certain number of the tires on hand, at San Francisco. We were to give notes for what we owed him, after this credit memorandum was issued; we were to have protection on the stock we kept, regardless of when it was purchased. We were to go—we were still to go out after Spring dating orders, and consider this just as though it had been purchased for Spring dating orders. In other words on whatever terms they could go after Spring dating orders, we could go after them with this stock. That meant in case of decline, if the government ruling permitted a guaranty against decline, we were to get it.” (Trans. pp. 409-410.)

Mr. Munnell testified that it was understood that the

agreement was subject to government ruling the same as such ruling might affect the Goodyear and Goodrich people or anybody else. (Trans. p. 430.)

Asked on cross-examination if the arrangement was that indicated in the letters of October 19th and 30th, (Exhibit X, Trans. p. 160, Exhibit AA, p. 169), Mr. Munnell testified:

“I am not referring to any letter at all. I am referring to verbal agreement we had with Mr. Fitzgerald, which was to the effect that if we kept the rest of this stock that we didn’t turn back to San Francisco in 1920, that stock would be put in position for us to go out and sell just as though we had ordered from factory on Spring dating terms, and protect our dealer in case of decline, in case it was in his hands.” (Trans. pp. 430-431.)

Asked if Fitzgerald could go further than the arrangement outlined in the letters of October 19th and 30th, the witness testified:

“That I don’t know. We had no way of knowing. He came here and offered wire from the factory showing they told him to let us return some tires and take notes for the balance. We didn’t know what his instructions were here. He might have had full instructions, and probably did have full instructions, we took it for granted that he did.” (Trans. p. 431.)

In connection with this answer, we call attention to Exhibit 1, (Trans. p. 57), which Fitzgerald showed the

defendants and left with them. The court should note that plaintiff failed to produce Fitzgerald's letter to the home office of November 19th referred to in the telegram. The court should also note in this telegram the words: "Have *all tires* returned San Francisco branch." (Trans. p. 57.)

This wire would clearly indicate that Fitzgerald had the authority to do what the defendants desired, namely, to permit them to return their tires to San Francisco so as to wipe out the indebtedness. It corroborates the claim of defendants that Fitzgerald had authority to make the agreement with them, that instead of returning all of the tires to the San Francisco branch they should return about \$6,000.00 worth, get notes for the balance and make a new deal by having price protection.

The inventory of goods on hand December 31, 1917, was about \$27,000. When the decline took place in May there was something like \$20,000 or \$22,000. Some goods had been purchased in the meantime. (Trans. p. 433.)

"Q. You want the court and jury to understand that Fitzgerald went further and said that you could have a rebate irrespective of when the merchandise had been purchased?

"A. This is what I want them to believe. Yes, sir." (Trans. p. 434.)

"Q. You claim that Fitzgerald agreed that you could have—agreed in December, 1920, some nine months later, that you could have a rebate on

that merchandise, if it were declared in the future?

“A. That was his agreement, yes.” (Trans. p. 435.)

Asked if they got an agreement in writing to this effect, witness stated that they did not. They did not have any idea whether there was going to be a price decline or not. (Trans. p. 436.) (Later Fitzgerald denied making the agreement. (Trans. p. 474.) Fitzgerald said nothing about submitting the proposition to the factory for rebates. (Trans. p. 438.)

Munnell further testified:

“We talked to Mr. Fitzgerald pretty plainly about keeping these, and asked him to tell us how we could compete with other manufacturers if we kept that stock and didn’t have protection; we were a distributor and practically in the same position as a factory branch, and that stock had to be—if we were going out to sell Spring dating, we had to be on the same basis as any other manufacturer or his branch in Portland, and he agreed to that.” (Trans. p. 438.)

Mr. Fitzgerald, in rebuttal upon the witness stand, with reference to this agreement at the time the notes were executed, testified as follows:

“Q. Now did you say anything to them at that time about your authority to give them any agreement of that sort?

“A. I don’t remember whether I did or not, but nevertheless Munnell & Sherrill understood just how far my authority extended, and even though I had agreed to give them price protection, they knew that I would have to first take it up with the factory.”

It is very clear from the testimony of Fitzgerald on pages 474 and 475 of the transcript, which has just been quoted, that defendants understood, and had a right to understand at the time the settlement was made, that they were to be given protection. On page 474 it is very clear that Mr. Fitzgerald’s answer took it for granted that they would be allowed this protection as a matter of course, for he testified as follows:

“Well, when getting back to these notes, when Munnell & Sherrill presented us with these notes this price protection proposition was gone into, and I told them I would take this matter up with the factory, and *presumed that in all probability they would be given price protection, but nothing ever came of it.*” (Trans. p. 479.)

It is very easy when matters are done orally to forget some words in a conversation, but we submit that the testimony of the Pacific Coast Manager, in spite of his attempt to disclaim final authority, clearly corroborates the testimony of plaintiff that there was an absolute agreement as to price protection on the goods kept by them when the settlement was made about December 2, 1920. In addition to this oral testimony, there are two letters which the plaintiff wrote the defendants which,

we submit, clearly show that Fitzgerald did take the matter up with his company and his presumption that in all probability they would be given price protection, (Trans. p. 479), was actually carried into effect by the company (though the company later attempts to repudiate this agreement) in their letter of May 10th, (Exhibit 3, Trans. p. 70), from the company's Akron office to the defendants. The new list giving the new price decline was enclosed, and in this letter we find the following:

“Prices will be adjusted back to May 2, and price guarantee will cover goods on hand and unsold, bought during March and April, *also unsold portion of dating orders.*”

It also stated that the discount would be 25-15 off consumer's list, subject to the usual cash discount and tax added, (Exhibit 3, Trans. p. 71) being the list of May 10, 1921, and further stating:

“Goods bought on dating and which are on hand and unsold on May 2nd may be included.”
(Not price protection.) (Trans. p. 72.)

Under this situation of the record, we find that the plaintiff in the Spring of 1921 has paid all notes outstanding which it executed on December 2nd, except three of the notes which are the subject matter of plaintiff's action.

Discharge of Note in Plaintiff's Third Cause of Action—When the price reduction was announced on

May 10th, defendants immediately undertook to get the credits therefor, pursuant to the agreement which they claim they made with Fitzgerald, and we now have presented the question whether the promissory note dated December 2, 1920, in the sum of \$2633.37, and mentioned in plaintiff's third cause of action, was satisfied by the agreement made and entered into between the plaintiff and the defendant pursuant to this understanding at the time the notes were executed, which agreement is pleaded in the third and separate answer of defendants to the third cause of action, as shown in paragraphs 1 to 8, inclusive, of pages 20 to 23 of the transcript. This defense is to the effect that pursuant to this agreement as to price protection that when the decline of May 10th, 1921, was announced, which the plaintiff received about May 12, 1921, that it was subsequently agreed that the note referred to in the third cause of action of plaintiff's complaint should be deemed as fully paid, satisfied and discharged. All of the correspondence which took place prior to December 2, 1920, hereinabove referred to, and the agreement which the defendants claim was made at the time the notes were executed, constitute the preliminary stages of the agreement which we claim was finally entered into for the discharge of the third promissory note as set forth in the further and separate answer to plaintiff's third cause of action.

Testimony of *A. J. Sherrill*—When tires declined May 10, 1921, defendants sent a list to plaintiff of tires on hand (Trans. p. 76), defendants' Exhibit 4, (Trans. p. 77), the letter was signed by their bookkeeper. (Trans.

p. 226.) Fitzgerald acknowledged receipt of this letter and list by letter of June 2, Exhibit 5. (Trans. pp. 81, 228.) Defendants answered this letter, Exhibit 5, by letter of June 4th, (Trans. p. 83) in which defendant said:

“The only agreement we know anything of is the one we made with you when we signed the notes last fall, and it was to the effect that we were to be protected against decline.”

Fitzgerald came to Portland on or about June 13, 1921, (Trans. pp 85, 276, Exhibit 35, p. 313), and defendants had a conversation with him in their office, with Auspach present. (Trans. pp. 84, 278.) Mr. Sherrill relates the conversation with Fitzgerald as follows:

“Mr. Fitzgerald came up to Portland and we talked over different things, and finally discussed the proposition of our rebate, and finally he said, well, he said, ‘The matter is in such a condition here,’ he says, ‘that it is going to be awfully hard to take this stock and figure out just exactly what your correct rebate would be.’ He says, ‘The tires have been purchased at different times and there was a fall dating’—the notes we gave him in the fall with the Spring dating order, and the tires that we had purchased since then, and he felt that it would be a pretty hard question to figure out the actual amount that we were entitled to on rebate, and he also felt that we were not entitled to a rebate on our entire stock, and we agreed with him on that, that possibly it would be better to make a sort of compromise. So he suggested that inas-

much as there were five notes, that we would consider one of these notes as the amount of the rebate and stated that he would go to San Francisco and issue us credit for that amount." (Trans. p. 86.)

On cross-examination Mr. Sherrill stated.

"Well, Mr. Fitzgerald said that the condition of the stock was such that it would be pretty hard to get at the matter any other way, and he thought our list as sent him was too large; that one of these notes would be a reasonable rebate." (Trans. p. 279.)

On a subsequent visit to Portland, the matter again came up, and Mr. Sherrill testified:

"At that particular time there was no mention made of any particular note, but at a subsequent visit to Portland Mr. Fitzgerald told us to hold the last note. We had taken the matter up with him as to credits which had not come through. After he had returned to San Francisco we didn't get our credits for these—credit for this amount, so when we took it up with him the second time when he came to Portland, which was possibly a month later, Mr. Fitzgerald said, 'Well, just pay — just hold out the last note. When you have come to the last note, why just hold that out, that will take care of the rebate.' " (Trans. p. 88.)

Again he testified that Mr. Fitzgerald told them, "That we were to take the last note; to pay the four

notes and take the last note as our rebate." (Trans. pp. 88-89.)

Sherrill was asked on cross-examination if he wrote the company to return the note, and he stated that he wrote to San Francisco.

See Exhibit 11, (Trans. p. 284), wherein defendants write:

"Seems as though we should have our credit for price decline which took place over ninety days ago. Have looked for it on our statements for July and August, but to date it has not appeared. Wish you would ask the factory to put this through, and greatly oblige."

Testimony of *H. A. Auspach*—This witness, after the May 10th decline, sent a list of tires in stock May 14, 1921. (Exhibit 42, Trans. p. 336.) Mr. Fitzgerald came to Portland in June, 1921, and had a conversation with defendants with reference to rebates on tires by reason of the cut of May 10, 1921. (Trans. p. 345.) Mr. Fitzgerald stated:

"He said that he thought we were asking a little too much for rebate on account of that decline, and Mr. Munnell replied that he—that we were entitled to it, but he wanted to be fair in the matter; as far as I recall; and Mr. Fitzgerald suggested that the rebate be the amount of one of these notes." (Trans. p. 346.)

Later, namely on August 15th, defendants wrote to

Fitzgerald with reference to the rebate. (Exhibit 11, Trans. p. 349.)

On cross-examination Mr. Auspach testified that the matter of credit on the stock on hand came up in the conversation in June. (Trans. p. 383.) Mr. Fitzgerald seemed to think defendants were asking an awful lot and he suggested the matter of one note. (Trans. p. 384.)

In reference to the letter of May 10th, sending a new list constituting a decline, (Exhibit 3, Trans. pp. 70-74), Mr. Auspach testified:

“That form letter they sent out—in fact I disregarded as Mr. Fitzgerald had made arrangements previously to have this entire stock on Spring dating terms.” (Trans. p. 384.)

Defendants were entitled under the arrangement made in December to rebate on all stock on hand at that time and entitled to rebate on purchases made in March and April, 1921. (Trans. p. 385-6.)

Defendants had made a list of everything in stock on May 14th and Mr. Fitzgerald was kicking about that. (Trans. p. 387.) Fitzgerald said nothing that it was out of his jurisdiction to consent to the cancellation of the notes, or that he would have to refer it to the factory. (Trans. p. 388.)

Testimony of *Edgar T. Munnell*.—Tires declined in May, 1921. (Trans. p. 411.) Fitzgerald arrived in June, 1921. Defendants had a conversation with him. Pre-

vious to his visit they had sent a list of tires and serial numbers, the list including the tires sold to dealers on Spring dating orders. (Trans. p. 411.) Mr. Munnell related the conversation as follows:

“Well, he said that the list we had sent down to them was a little bit stiff, and it looked like everything we had on hand. If I remember rightly, he said it looked as though it was all the tires we had on hand when he was here in November. I said it isn’t, it is the tires we had on hand on May 14, 1921, and the tires that we sold to dealers upon which we had to give protection. Well, he says it looks pretty stiff. I says yes, but we want to be fair in the matter. What have you to suggest? Well, he says, I haven’t figured this exactly, but it would look to me as though this rebate on this list that you sent us amounted to over \$4000. I said, I think possibly it would, between \$4000 and \$5000. He says, ‘Suppose I give you credit for one of these notes to apply on that, to take care of this rebate. Would that be satisfactory?’ Well, I said, I think it would. I said it would be with me; I says, ‘Of course, Mr. Sherrill has got to be considered in this, but I will take it up with him.’ Now whether Mr. Sherrill was in the office at that time or had come in, I can’t say. It wasn’t—it was a very short time afterwards, either the same day or the next day, that we agreed on this, the amount of one of those notes taking credit on that rebate. Understand, that at no time when Mr. Fitzgerald was here in June did he go over our stock and take an inventory of it to see how many of these tires we were entitled to rebate on, or not.” (Trans. pp.

412-413.)

Fitzgerald later made a visit in July or August, or it may have been in September, at least, it was afterwards. At that time he told us to hold out one of the notes and not pay it. This is the third time they took the matter up and that is what he stated, and under this arrangement they are claiming satisfaction and discharge of that note in settlement of the rebate made on May 10, 1921. (The note is the one referred to in plaintiff's third cause of action.) (Trans. p. 414.)

The list of tires in stock on May 14, 1921, (Exh. 4, Trans. p. 77), was prepared pursuant to Mr. Munnell's direction and forwarded to plaintiff in 'Frisco. (Trans. p. 438.) The letter that accompanied the list is Exhibit 4. (Trans. p. 439.)

The foregoing testimony in the light of the transactions occurring previous to December 2, 1920, constitutes defendants' case consisting of a discharge of the notes set forth in plaintiff's third cause of action, and as pleaded in defendants' further and separate answer thereto, (Trans. pp. 20-23), and we respectfully submit that it was sufficient to take the question to the jury whether the note is discharged.

In the matter of this note Fitzgerald's testimony, though it does not agree with that of defendants, contains some interesting statements. Prior to his coming up in June, he did receive a list of tires on which defendants claimed a rebate by reason of the decline in prices announced May 10, 1921. (Trans. p. 478.)

Testimony of *W. G. Fitzgerald*—We have heretofore referred to the fact that Fitzgerald testified at the time the notes were given that the price protection proposition was gone into, and he told the defendants he would take the matter up with the factory, and *presumed that in all probability they* would be given price protection. (Trans. p. 479.) He states that nothing came of it, however. It is clear from this that the defendants were undoubtedly led to believe that they would be given this price protection when they gave the notes, otherwise they would have shipped all the tires to 'Frisco. For Fitzgerald's telegram from his home office directed "*all tires*" to be returned to San Francisco. (Exh. 1, Trans. p. 57.) So in reference to the conversation in June as to the rebate by reason of the May 10th decline, Mr. Fitzgerald testified:

"Well, I remarked to these gentlemen that if we were to give them a rebate covering every tire that was on that list, that it would probably amount to \$3500 to \$4000, and they agreed that it would, and whether or not I remarked myself that if I got them a rebate it wouldn't exceed one of these notes, or whether Mr. Munnell or Sherrill suggested that one of these notes be turned back to take care of a rebate, I don't know, but, however, I did take that matter up with the factory, and suggested that." (Trans. pp. 479-480.)

It is very clear from this testimony that Fitzgerald, the Pacific Coast Manager, himself considers that they were entitled to the rebate, though he claims that he had

no authority to grant the rebate, but that it had to be done by the factory. (Trans. p. 481.)

After the conference in June, upon glancing at the list he surmised that it would amount to between \$3500 and \$4000. He stated that if they were able to get a rebate on the tires he would think it would amount to about the equivalent of the note. (Trans. p. 479.) He did not tell them they were not entitled to a rebate. He stated he thought it would amount to about the equivalent of the note. (Trans. p. 498.) He said that there were no definite promises to them that they would get a rebate.

“Q. It was just general assumption that they would get it?

“Ans. On their part, yes.

“Q. And on your part?

“Ans. *Not altogether.*” (Trans. p. 498.)

On cross-examination he was asked if he, Fitzgerald, did not suggest that they should hold out one of the notes until they should get the rebate they were entitled to, and he answered, “I did.” (Trans. p. 499.) He then tried to qualify his admission by stating that they were entitled to a rebate “to the extent of about \$500.00, I think.” (Trans. p. 500.) Yet his previous admission shows that until he attempted to hedge on the witness stand he had previously stated to them that he considered they were entitled to the rebate amounting to the \$2633 and some cents.

On cross-examination he further testified that he had given full price protection to the extent of the decline to the Tire Service House of Seattle, (Trans. p. 503), and to the Knott Atwater Co. at Spokane, (Trans. p. 505), though he claims that was on certain special orders only.

Defendants tried to show on re-cross-examination that the plaintiff repudiated that agreement made to the firm in Seattle, but the court would not permit evidence to be introduced as to the matter. (Trans. p. 516.)

We submit that under the foregoing evidence it was clearly the duty of the court to submit to the jury the question whether the defendants' defense to plaintiff's third cause of action was made out.

The question of authority will be hereafter analyzed.

QUESTION OF CREDIT OF \$249.44

We will now examine the testimony as to the claim of defendants that they were entitled to a credit in the sum of \$249.44 by reason of a decline announced by the plaintiff November 15, 1921, for which decline plaintiff allowed them only the sum of \$111.68.

Plaintiff offered in evidence Exhibit JJJ, showing the purchases made by the defendants from the plaintiff. (Trans. p. 468.) Defendants offered in evidence Exhibit 44, which was a credit in the sum of \$111.63 issued to defendants on December 28, 1921, by reason of the November 15, 1921, decline. (Trans. p. 356.) Exhibit 43 is a letter sent by defendants to plaintiff on Novem-

ber 21, 1921, showing the amount of tires and tubes received *since* September 15, 1921, and which were on hand at the time of the decline in price November 15th, and subject to rebate, (Trans. p. 355), which new price list which is referred to herein and in the testimony as the decline of November 15, 1921, is Exhibit 45. (Trans. pp. 368-371.) This list gives the rebate on goods bought since September 15th, and on hand unsold November 15th. The list under which defendants purchased goods between September 15th to November 15th, 1921, is the list of May 10th, 1921. (Exhibit 3, Trans. pp. 73-74.) In other words, the tires and tubes listed in Exhibit 43, (Trans. p. 355), were purchased according to the list of May 10, 1921. Exhibit 3, pp. 73-74.) The price was cut by the list announced November 15, 1921. (Exhibit 45, pp. 369-371.) It is a mere matter of compilation to ascertain whether the goods bought between September 15th and November 15th, and shown in Exhibit 43, (Trans. p. 355), and which were paid for under list Exhibit 3, (Trans. p. 73), amounts to the sum of \$111.68 according to the credit issued, (Exhibit 44, p. 356), or the sum of \$249.44 claimed by the defendants.

We submit herewith a compilation as we work it out from the testimony showing that \$249.44 is the correct amount.

Mohawk Credit Memo. No. 429, of December 28th, 1923, as it should be, using the May 10th, 1921, and November 15th, 1921, lists and prevailing discounts:

	MAY 10TH LIST	NOV. 15TH LIST	DIF. IN LISTS	Disc.	NET DIF. IN COST	TOTAL
5—30x3½ N. S. Fabs.	\$21.00	\$17.00	\$ 4.00	25-15%	\$ 2.55	\$12.75
2—31x3½ N. S. Fabs.	23.00	19.00	4.00	25-15%	2.55	5.10
2—34x3½ N. S. Fabs.	28.00	24.00	4.00	25-15%	2.55	5.10
2—33x4 N. S. Fabs.	34.50	30.00	4.50	25-15%	2.87	5.74
1—37x4½ N. S. Fab.	49.00	44.00	5.00	25-15%	3.19	3.19
2—35x4 N. S. Fabs.	38.00	32.50	5.50	25-15%	3.50	7.00
5—33x4 N. S. Cords	52.50	35.15	17.35	25-15%	11.06	55.30
5—34x4 N. S. Cords	53.50	36.10	17.40	25-15%	11.09	55.45
1—33x4½ Rib Cord	57.50	44.05	13.45	25-15%	8.58	8.58
3—33x4½ N. S. Cords	59.00	45.20	13.80	25-15%	8.80	26.40
4—34x5 N. S. Cords	73.00	56.50	16.50	25-15%	10.52	42.08
4—28x3 Red Tubes	2.50	2.20	.30	25-15%	.17	.68
4—35x4 Red Tubes	4.85	4.25	.60	25-15%	.38	1.52
1—31x3½ Red Tube	3.55	3.00	.55	25-15%	.35	.35
5—31x4 Red Tubes	4.20	3.50	.70	25-15%	.44	2.20
5—33x4 Red Tubes	4.50	3.85	.65	25-15%	.42	2.10
6—37x5 Red Tubes	7.35	6.30	1.05	25-15%	.67	4.02
						<hr/>
						\$237.56
5% Excise Tax						11.88
						<hr/>
Total						\$249.44

The testimony in reference to this matter is as follows:

As shown by Exhibit 44, (Trans. p. 356), the credit of \$111.68 by reason of the November 15, 1921, decline, was issued December 28, 1921. On January 23rd, (Exhibit 13, Trans. p. 287), defendants write to plaintiff notifying them that the credit sent for rebate covering

tires on hand November 15th, and purchased within the past sixty days, was not in line as they could readily see by glancing at it, notifying them of the return of the credit for correction, and trusting that they will figure it correctly so that their records will agree with the defendants' records.

Testimony of *H. A. Auspach*, in reference to the credit of \$249.44. Defendants received a credit memorandum with reference to the disputed item of rebate of \$249.44, (Trans. p. 350), referring to Exhibit 44 subsequently introduced, (Trans. p. 356). Plaintiff did not give defendants credit for the \$249.44. Credit issued is dated December 28, 1921. (Trans. p. 351). New price list on November 15th, 1921. (Trans. p. 351.) Based upon the same price decline list, (Exhibit 45, Trans. p. 369), the real credit defendants are entitled to is the difference of the old cost and the new cost on each tire.

On page 353 of the transcript the witness refers to having *lost* the list sent by the plaintiff to defendants; the list is subsequently found and produced and is offered in evidence as Exhibit 45, (Trans. p. 369), and based upon the two lists and the tires as shown on Exhibit 43, the difference, as the witness figures it, is \$249.-44. (Trans. p. 355.)

Witness *personally* mailed to plaintiff, letter of November 21st, Exhibit 43, (Trans. p. 355), containing a list of the tires and tubes received since September 15th,

and on hand November 15th, 1921, and plaintiff issued a credit only of \$111.68, Exhibit 44. (Trans. p. 356.)

In figuring the amount of credit which the Mohawk Rubber Company should give defendants, on cross-examination he testified that (Exhibit 43) the list sent to the plaintiff by the defendant is a correct list. (Trans. p. 372.) There is no dispute as to the *number of tires* on which they are to be allowed a credit, the only dispute being as to the *amount* of the credit. (Trans. p. 373.) In order to figure the amount due, witness takes the list of November 15, figures the 25 and 15% off, giving defendants' cost of the tires, and deducting the amount from the original cost, as shown by Exhibit 3, (Trans. pp. 73, 373.)

When plaintiff sent the credit memorandum, Exhibit 44, defendants wrote them about it. (Trans. p. 375.) The tires given in the list, Exhibit 43, were bought within 60 days of the date of decline. (Trans. p. 375.) Witness explains method of computation by defendants. (Trans. p. 376.) Computation *above set forth* (p. 62 of this Brief), covers the credit according to defendants' contention.

Conclusion—We submit that this matter was a proper matter to be submitted to the jury, and, furthermore, that a computation made by the court will verify the contention of defendants that they were entitled to a credit of \$249.44.

CREDIT FOR TIRES DELIVERED TO AMERICAN TIRE & RUBBER CO.

There remains to be considered the amount of credit which defendants are entitled to by reason of the tires turned over to the American Tire & Rubber Company, which transaction we will hereafter, for the sake of brevity, refer to as the Cassidy deal.

Defendants allege that in September, 1921, the plaintiff entered into negotiations with the American Tire & Rubber Co. to handle its line of tires in the District of Oregon, though the defendants herein have exclusive agency for said district; that the defendants consented to such change of agency by the plaintiff, provided the Mohawk tires held in stock by the said defendants would be turned over to this plaintiff or its agent and these defendants be credited with the amounts represented by these tires so turned over; that the said plaintiff by and through its duly authorized agent has consented to such arrangement, these defendants to deliver to the American Tire & Rubber Co. with the consent and at the request of the Mohawk Rubber Co. a large quantity of tires then held in stock by them, which were of the agreed value of \$9,814.20. (Trans. pp. 15-16, par. VII, VIII and IX; trans. p. 19, par. VII, VIII, and IX; trans. p. 26, par. VII, VIII, and IX.) For the tires turned over by the defendants on the Cassidy deal, plaintiff issued a credit memorandum for \$1,079.25, (Exhibit 8, p. 98), instead of issuing to defendants a credit memorandum for \$9,814.20, which de-

fendants claim is the amount of the credit due it for the tires turned over on the Cassidy deal. The testimony in reference to this matter is in substance as follows:

Testimony of A. J. Sherrill—Mr. Fitzgerald called on the defendants about the first or second week in September, 1921. Defendants had not been getting along very well with the Mohawk line, they were not selling any large truck tires. (Trans. p. 90.) Mr. Fitzgerald asked Mr. Sherrill about letting Cassidy sell pneumatic truck tires, which was the large size defendants were not selling. Mr. Sherrill told him that he did not believe they could get Cassidy as he was tied up with the general factory, and Fitzgerald told him that he had had an interview with Cassidy in San Francisco. He felt he could get Cassidy as a distributor, and Fitzgerald suggested that, or agreed we would allow him to do that if he would take the stock off our hands. Defendants had exclusive rights in the territory, and if they did not stand in his way he would relieve defendants of the stock, and while there was no amount of stock specified, the agreement called for any stock that defendants might give to Cassidy, and defendants later delivered to Cassidy the stock that they considered was the amount of their indebtedness. (Trans. p. 91.) Mr. Fitzgerald asked Sherrill what Munnell would say about changing the line, and he told him to ask him. Mr. Munnell came in, and Mr. Fitzgerald said: "Ed, if I take your stock off your hands, can I transfer the account to Cassidy or the American Tire & Rubber Co?" and Ed said: "Yes, if you relieve us of our stock you can do that." They had

an understanding with Fitzgerald that they could transfer the Mohawk line to Cassidy in consideration of taking the defendants' stock off their hands. (Trans. p. 92.) The conversation is repeated in cross-examination, (Trans. p. 234), and defendants agreed that plaintiff could secure Cassidy to take over their line provided plaintiff would relieve defendants of their stock. (Trans. p. 235). Mr. Fitzgerald asked Munnell what he thought about it, and Mr. Munnell said he was agreeable, provided he took the stock. Fitzgerald said that he would see Cassidy and see what could be done. He thought he could line him up. (Trans. p. 237.) The conversation took place about a week before September 18, 1921. (Trans. p. 233.) Asked on cross-examination if Fitzgerald told him that the factory had become dissatisfied with the condition of their account, Sherrill said: "He did not." (Trans. p. 238.) Asked if Fitzgerald told him that the plaintiff had to sever relations with defendants' firm, Mr. Sherrill testified: "No. Fitzgerald never told us that . . . never at any time." (Trans. p. 239.)

We wish to call the attention of the court that the testimony of Fitzgerald *contains no such intimation*.

Mr. Fitzgerald then went to Seattle and later returned to Portland, and about a week after the first conversation, namely on September 17th, they had another conversation with him at defendant's place of business with Munnell and Auspach present. (Trans. p. 240.)

Fitzgerald said he was going to be able to get Cas-

sidy to handle the entire line. (Trans. p. 241.) Thereupon, Sherrill and Fitzgerald took stock. They both went out into the store and took the number of tires they had on hand. (Trans. p. 241.) Some of the tires were in racks on the first floor and some piled on the second floor. A record was made of that stock taking. The inventory was taken down on small pieces of paper and afterwards placed on a piece of paper. (Trans. p. 243.) The paper is in Mr. Fitzgerald's handwriting. The stock taking was at the place of business at First and Ash. The writing upon the paper in ink is in Fitzgerald's handwriting. The lead pencil notations thereafter are in the handwriting of some one in the office. (Trans. p: 243.)

The inventory referred to was subsequently offered in evidence as Exhibit 40. (Trans. p. 323.) It is referred to in the testimony as being on yellow sheets, (Trans. p. 388), and is referred to in the testimony of Fitzgerald as pink sheets, and is admitted by Mr. Fitzgerald to be in his handwriting. (Trans. p. 514.)

After they took stock, Fitzgerald stated he would give defendants a letter of authority for turning the stock over to Cassidy. "As soon as he gave us that we were to allow Cassidy to send down and get the stock." (Trans. p. 244.) At the first interview, it was stated if Fitzgerald got Cassidy, he would take defendants' stock off their hands and turn it over to Cassidy. (Trans. p. 245.) At the second interview he said he had made arrangements with Cassidy as to taking over the line and

taking the defendants' stock. (Trans. p. 246.) Fitzgerald said as soon as final arrangements could be made he would give us this letter authorizing us turning this stock over to Mr. Cassidy. (Trans. p. 247.) Defendants had an interview with Cassidy and Fitzgerald on Sunday, September 17th, at Cassidy's place of business. (Trans. p. 247.) Fitzgerald was endeavoring to arrange with Cassidy to have defendants draw tires from Cassidy and continue to sell Mohawk tires in the city. (Trans. p. 248.) This was another reason why defendants did not deliver all the stock to Cassidy as they could have done.

The list made by Fitzgerald (Exhibit 40), (Trans. p. 325), was submitted, and Cassidy and Fitzgerald were checking it over, and Cassidy informed defendants that he was just ordering or had ordered a carload of tires from the Mohawk, and that they were getting out a new flat tread tire. The list was shown and there was a number of bad sizes in there. (Trans. p. 248.) Mr. Cassidy remarked about certain sizes, and *Mr. Fitzgerald said that that would be all right, to go ahead and take whatever* defendants sent him, and if he did not sell them, at a later date he could send them to San Francisco, that he would give him other tires in exchange. Witness is positive as to this statement by Fitzgerald. (This is absolutely corroborated by Cassidy, who was called as plaintiff's witness, see *infra*.)

The next thing apparently was the receipt by de-

fendants of a letter of September 18, 1921. (Trans. p. 241. See Exh. 37, p. 93.)

Mr. Sherrill testified that the stock was not balanced very good because of the fact that they had been unable to move their stock and had to take back so much stock from dealers. (Trans. p. 258.)

On the inventory list that Mr. Fitzgerald and Mr. Sherrill made and offered in evidence as defendants' Exhibit 40, (Trans. pp. 322-5), the *writing in ink* is in Mr. Fitzgerald's handwriting. Mr. Sherrill thinks the *pencil writing* is either that of Mr. Munnell or Mr. Auspach. Pencil notations on the list or figures, he thinks, are in the handwriting of Mr. Fitzgerald. (Trans. p. 323.) (Munnell later testifies that the pencil notations are his.)

On re-direct examination Mr. Sherrill testified that it was understood that so far as the tires shown in the Fitzgerald list (Exhibit 40) were concerned, any or all of the tires on that list could be turned over to the American Tire & Rubber Co., and there were no tires on the list which the defendants were directed by either Fitzgerald or Cassidy to keep and not turn over to said American Tire & Rubber Co. (Trans. p. 331.)

On re-cross-examination Mr. Sherrill testified that the interview had with Cassidy at the store on Sunday was the only interview with Cassidy with reference to turning over of the merchandise. (Trans. p. 332.)

Before pursuing this transaction further with reference to the letter authorizing the turning over of the tires in the Cassidy deal and the subsequent developments, we think it advisable to present the other testimony upon this matter up to that time, and will accordingly leave Mr. Sherrill's testimony at the point where the transactions had arrived just prior to the letter of September 18, 1921. (Def. Ex. 7.)

Testimony of H. A. Auspach—Mr. Fitzgerald came up from San Francisco in September. Witness was present. Had a conversation with Munnell and Sherrill, which occurred at the offices at First and Ash streets. Fitzgerald made two trips to the office regarding the change from defendants to Cassidy. The first one was in reference to interesting American Tire & Rubber Company in large sizes, and later, four or five days, or maybe a week, Fitzgerald made a second call. Mr. Fitzgerald said he thought he could interest Mr. Cassidy in the larger sizes of tires; that we were not moving them; that we were not moving many large truck sizes; and Mr. Sherrill says that he didn't think that Fitzgerald could interest Cassidy in the line, because he had the General line of tires—was tied up with them. (Trans. p. 359.) This conversation took place at the first interview. At the second interview, Fitzgerald seemed to think that he could place the entire line with the American Tire & Rubber Company. (Trans. p. 359.) Witness states that it is pretty hard to remember the exact words and gave the conversation in a general way to the best of his recollection as follows:

“Mr. Fitzgerald wanted to know what we thought of giving up the Mohawk line; that he could place it with Mr. Cassidy; and Mr. Fitzgerald was talking to Mr. Sherrill, as I recall it now, in the front office, and I know he came into the inner office, that is, the larger office, and asked Mr. Munnell what he thought about it.” (Trans. p. 360.)

Mr. Sherrill and Mr. Fitzgerald came into the inner office and asked Mr. Munnell, “Whether he would consent to this change in distributorship if the Mohawk Company relieved Munnell & Sherrill Company of their stock of tires.” (Trans. p. 360.) Mr. Munnell told him he would agree to it. (Trans. p. 361.)

Fitzgerald and Sherrill then started out of the office to count the tires that were on hand to turn over; witness did not see them counting, as he stayed in the office. (Trans. pp. 361 and 388.)

Witness saw Exhibit 40. Fitzgerald made it up from little slips of paper he made notes on in counting tires, brought them into the office and made the list up. The ink portion of the list is in Fitzgerald’s handwriting. He wrote it there at the office. (Trans. p. 362.)

On cross-examination he stated that Fitzgerald and Sherrill went out into the stock room and made the list after they came back. Fitzgerald sat down in the office and wrote the paper. As to the figures in lead pencil, (On Exhibit 40), witness states they are not his figures

but are the figures of Munnell. (We wish to call attention at this time that Exhibit 40 as pleaded in the transcript does not show the pencil notations, and we shall attempt between the time of writing this brief and the hearing of this court to have this original exhibit before the court for inspection.) He thinks the lead pencil figures appearing opposite the items represent the cost of the tires to Munnell & Sherrill at the current price at that time. (Trans. p. 390.) He thinks it is the price at which they were billed out to the Mohawk people after the delivery to Cassidy.

Testimony of E. T. Munnell—For the transaction up to the receipt of the letter authorizing the delivery of the tires (Exhibit 7), Mr. Munnell testified:

“As I recall it, it was early in September; Mr. Fitzgerald was there and talking with Mr. Sherrill in the front office, and Mr. Auspach and I were working in the back office, probably ten or fifteen feet away. They had been talking for some time, I am not sure how long, might have been half an hour, might have been longer. They came out in the office or else I went to the door, and they called me, and Mr. Fitzgerald said ‘What kind of a—how would it seem to you if I would make a deal with the American Tire & Rubber Company to take care of this territory? Mr. Sherrill (Fitzgerald) says if I take the stock off your hand at what it cost you that would be satisfactory—would that be satisfactory to you?’ I said yes. I think, if I remember rightly, I made it a little stronger than that, but I said yes. The

next thing was Mr. Fitzgerald said that he thought that would be fair, and thought it could be arranged, and I don't know whether I or Mr. Sherrill said that we would help him. I think it must have been Mr. Sherrill, because he knew Mr. Cassidy much better than I did. I think Mr. Sherrill stated, 'If we can help you we will do it, but I don't think there is any chance.'

"Q. All right, what next occurred after that?

"A. Well, I don't think there was anything happened after that, as far as I am concerned, regarding the deal with Cassidy. If I remember, either I left town or Mr. Fitzgerald left town right—either that day or the next day. I know on the 13th of September I went to Seattle, and was in Seattle when I had a long distance call from the office saying that Mr. Fitzgerald had come back to town, and they were ready to make the deal." (Trans. pp. 415-416.)

Mr. Munnell came back from Seattle Saturday, the 17th, and had a conference in Cassiday's office Sunday, September 18th. Cassidy, Fitzgerald and the defendants were present. (Trans. p. 417.)

Asked to relate the conversation occurring, he testified:

"Well, there was more or less talk about how it could be arranged for us to continue selling Mohawk tires in conjunction with the American Tire & Rubber Company, on what kind of a ba-

sis, and that was one of the important matters that we took up. The other matter, as I recall it, was the amount of stock that Cassidy would expect to receive from us. Mr. Cassidy had the day before, or previously anyway, or else that day sometime, given Mr. Fitzgerald an order for tires, and when Mr. Sherrill and I got there to go into the matter of how many tires were to be turned over, there were to be certain changes made in that order. Mr. Cassidy sat on one side of the desk, the side he usually sits on, which would be represented by where Mr. Fitzgerald sits now, and I was on this side of the desk with a list, with this orange list of tires in my hand. Mr. Cassidy was checking off the sizes that he was going to buy, and I was showing him the number of tires we had to be turned over to him. . . . This was an approximate list of the tires we had on hand to turn over. We were going to keep a few. The list as originally made out was made out by Mr. Fitzgerald. I added the figures here, to get an idea as to about how much stock we had on hand at that time. . . . I am not certain when, whether it was before they were up to Mr. Cassidy's, or afterwards." (Trans. pp. 418-419.)

(Exhibit 40 which he refers to as the orange list, and which by other witnesses has been referred to as the pink list and yellow list, is the exhibit with the lead pencil notations above referred to, and which should be before the court for inspection.)

He further related the conversation as follows:

“I said, ‘Here is an approximate list of the tires we have to turn over.’ And we came to two or three sizes here that we were long on, and we had some of them ordered in this order that he had given to Mr. Fitzgerald.

“Q. What occurred in reference to that, what was said?

“A. I said, ‘You don’t want to order any—here is twenty-three 34x41½ non-skid Cord. You don’t want to order any of them, I have twenty-three of them.’ He says, ‘Let them come along, we can use them.’ That might not have been the size, but was a large amount like that, and was a size I thought he shouldn’t have ordered so many of because we had this certain number to turn over.

“Q. What was said with reference to your right or your power to turn over that entire list to Cassidy, if desired.

“A. At no time during the talk with Mr. Fitzgerald and the talk with Mr. Cassidy was there anything said about how many we were going to turn over, it was supposed *we could turn over everything we had.*” (Trans. pp. 419-420.)

Fitzgerald said, “You better *go as easy as you can* and not send *all* those tires over to Cassidy.”

With reference to the Cassidy deal, on cross-examination Mr. Munnell stated:

“The proposition was that the stock was to be taken off our hands by the Mohawk Rubber Company at what it cost us. . . . It was understood that it was to be turned over to Cassidy.”
(Trans. p. 441.)

Fitzgerald was going to deal with Cassidy or the American Tire & Rubber Company. We were agreeable to his giving him all or part of the territory, provided all stock was taken off our hands at what it cost us.
(Trans. p. 442.)

DELIVERY OF TIRES

We come now to the letter of September 18th, 1921, and the transactions occurring subsequent thereto.

Testimony of *A. J. Sherrill*—Fitzgerald sent a letter to defendants pursuant to the transactions as we have stated them. The letter was dated September 18, 1921, and is offered in evidence as defendants' Exhibit 37, (Trans. p. 93), and this letter read as follows:

Portland, Oregon, Sept. 18th, 1921.

Munnell and Sherrill,
Portland, Oregon.

Dear Sirs:

“This letter will be your authority to turn over to George H. Cassidy, Prop. of the American Tire and Rubber Co. of your city, *any* Mohawk tires or tubes that you have in stock at present and in *any* quantity or sizes that *might be agreeable to yourselves and the said*

George H. Cassidy, Prop. of the American Tire and Rubber Co.

"Please furnish us with a list showing the serials, styles and types of any tires that you might turn over to the other party, also furnish us with list showing the red and gray tubes that might be transferred to the same party. *Upon receipt of said lists and information, credits for the amount will be issued to apply against your account.*

Yours very truly,

Mohawk Rubber Co., Inc., of N. Y.

By W. G. Fitzgerald,

Pacific Coast Manager."

(Trans. pp. 93-94.)

Let us analyze this letter. The letter gives authority to the defendants to turn over to George H. Cassidy *any* Mohawk tires or tubes that the defendants had in stock at that time, and in *any quantity or sizes* that might be agreeable to the defendants and the said Cassidy. Upon furnishing plaintiff with a list thereof, they agreed to issue credits for the amount to apply against the account of the defendants. The court should notice that this letter does not limit the authority of the defendants to turn over certain Mohawk tires in any limited quantity or any limited size. Under this letter defendants had a right to turn over *any* Mohawk tires, which included *all* they had in stock, *or a portion* that they had in stock, the quantity and size being left to Cassidy and the defendants. Under this letter the defendants turned

over tires amounting to \$9,814.20 in value, and the question is, were the quantity and size agreeable to the defendants and the said Cassidy? Defendants furnished to the plaintiff a list of the tires turned over to the American Tire and Rubber Co. Fitzgerald knew the tires that the defendants had on hand, (Trans. p. 94), and he wrote the stock list thereof, (Exh. 40.) The list of tires delivered to Cassidy and sent to plaintiff is defendants' Exhibit 9. (Trans. p. 103.) Fitzgerald *did turn* the Mohawk line over to Cassidy, and the defendants *surrendered their right* to that line. Whether or not they had the right to hold an *exclusive agency*, the fact remains that the defendant had an exclusive agency as distributors of the Mohawk line up to that time. Cassidy *received* the tires; he *sent his truck* for them and *his* truck man signed the shipping receipt. (Trans. p. 95.) The receipt given by the truck man is Exhibit 10. (Trans. p. 109.) Instead of giving defendants credit for the tires turned over amounting to \$9,814.20, plaintiff gave defendants credits, (Trans. p. 97), in the sum of \$1,079.25. (Exhibit 8, Trans. p. 98.)

Testimony of *H. A. Auspach*—Witness is familiar with the letter of instructions in reference to the Cassidy deal, (Defendants' Exhibit 7), and prepared a list of the tires turned over to Cassidy and mailed that list personally to the plaintiff. (Trans. p. 100.) The list sent was offered as defendants' Exhibit 9. (Trans. p. 103.)

On September 21st defendants notified the plaintiff

by letter (Exhibit 36, Trans. p. 314), that they have transferred practically all of the stock of Mohawk tires to Cassidy's Company.

"We are sending the numbers to San Francisco, asking that they credit our account for same."

Auspach counted the tires that he turned over to Cassidy's dray man. (Trans. p. 108.) The shipping bill, (Defendants' Exhibit 10), had a statement thereon in writing:

"Received in good order."

This shipping bill and receipt were signed by the agent of Cassidy, but the court, we believe, erroneously, excluded from evidence that statement. Defendants believe it was proper evidence in view of the claim of plaintiff's letters that the tires were not in good condition after they were receipted for as being in good condition, and the evidence shows that Cassidy never made any complaint as to the condition of the tires he received. (In view of the verdict the ruling was harmless.)

Testimony of *A. J. Sherrill* (Resumed)—Munnell and Sherrill did not employ the transfer man or dray man who came for the tires. (Trans. p. 110.) He receipted for the number of tires and no shortage was reported. Mr. Cassidy never made any complaint with reference to the tires. Mr. Fitzgerald went through the list of tires turned over to Cassidy and saw them and

the tires the dray man received were the tires that Fitzgerald saw. Neither Mr. Cassidy nor the American Tire and Rubber Company has offered to return any tires turned over to their drayman. (Trans. p. 111.) Cassidy and the American Tire and Rubber Company never complained about not receiving enough tires, or getting too many, or that there was anything the matter with the quality or anything else. Cassidy never indicated that he did not agree to receive the tires which were turned over to him. The next thing he heard about the matter was a wire from San Francisco. (Exh. BBB, Trans. p. 256.) Defendants retained between \$4,000 and \$5,000 worth of tires from the stock which they delivered to Cassidy, the stock which Fitzgerald saw. (Trans. p. 112.) None were sent to Cassidy from the upper store, (which Fitzgerald did not see.) (Trans. p. 113.) Fitzgerald did not check out the tires which defendants should deliver to Cassidy. Defendants did not receive any complaint from Cassidy or his company with reference to the tires, the amount received, the quality, the condition or otherwise. (Trans. p. 114.)

The balance due defendants from plaintiff was tendered into court with defendants' answers, amounting to the sum of \$387.40.

On cross-examination Mr. Sherrill was asked if, under his authority, it was not up to Cassidy to see what tires he would take, and he answered that if Cassidy wished to reject the tires he had the opportunity when he sent down for the tires, and that Cassidy *was*

told by Fitzgerald to take any tires that we gave him. (Trans. p. 250.) Cassidy 'phoned to defendants to get the tires up and as quickly as they could. He told us to send the tires. (Trans. p. 251.) Before that he had gotten certain sizes he was urgently in need of, and got the balance at the time he sent his truck there for the tires. Cassidy said nothing about the quantity; defendants determined the amount by the amount of their indebtedness to the Mohawk Rubber Co. and kept a representative stock. (Trans. p. 253.)

It should be remembered by the court that when the tires were delivered by the defendants to Cassidy, it was the expectation of all the parties, including the defendants, Fitzgerald and Cassidy, that the defendants would continue to sell Mohawk tires at their retail store in Portland, and, therefore, there was no need for them to deliver to Cassidy more tires than would balance their account; had the defendants understood that they were not to be given credit for the note mentioned in the third cause of action, they *could have delivered* from the tires they retained sufficient stock to have *liquidated that note*. Their conduct shows unmistakably that they understood from Fitzgerald, and believed that the May 10th decline and the subsequent agreement with Fitzgerald had liquidated the note mentioned in the third cause of action, for, otherwise, they would have included a quantity of tires sufficient to liquidate that note with the tires sent to Cassidy. They took the number of tires which would equal the indebtedness and sent them to Cassidy.

The arrangements to deliver tires were not made with Cassidy, they were made with Fitzgerald. Cassidy saw the list showing sizes and style. (Trans. p. 254.) Cassidy sent the tires which defendants delivered to him to San Francisco *after his carload had arrived* from Akron. Cassidy told Sherrill that as soon as his car arrived, or after his car arrived, that he had plenty of new stock and did not want them (tires delivered by defendants) any longer. (Trans. p. 255.) Fitzgerald knew what stock was to be delivered to Cassidy as he took stock himself. Mr. Fitzgerald sent defendants the letter and left town. (Trans. p. 262).

The list of stock of defendants taken by Fitzgerald in handwriting made by Fitzgerald was offered in evidence. (Defendants' Exhibit 40, Trans. p. 323.)

All arrangements were made with Fitzgerald on Saturday and they were to get Cassidy on Sunday to arrange with him regarding the *handling of the line by the defendants through Cassidy in the City of Portland*, that is, buying for defendants' retail store; also to submit a list of the tires showing Cassidy what defendants were going to send up. (Trans. p. 327.)

“We were to take the list as we had it there, to show Mr. Cassidy what our stock consisted of. We were also to arrange with Mr. Cassidy, if possible to do so, for us to handle the line in the City of Portland, and naturally when we submitted the list to Mr. Cassidy we went over the various sizes, and Mr. Cassidy remarked about

certain sizes of these tires, and Mr. Fitzgerald says, 'Well,' he says, 'there is a few of these that will be slow to move, but take this stock in here, George, and what you can't sell at a later date return to us at San Francisco, and we will exchange stock for what you return.' (Trans. p. 328.)

Two deliveries were made to Cassidy prior to Saturday and Sunday when they got together. (Trans. p. 328-329.)

Fitzgerald told defendants to go ahead and send the tires to Cassidy, such sizes as defendants could give him and as he needed them, and that when the deal was terminated that Fitzgerald would give the defendants a letter of authority and defendants delivered the tires and charged them back to the Mohawk Company, (Trans. p. 329), and this was done pursuant to directions given by Fitzgerald orally.

When the letter of instruction was given (plaintiff's Exhibit 7), defendants considered the deal terminated, and that was their authority to deliver the balance of the stock. (Trans. p. 330.)

Mr. Sherrill was asked what his reason was for not turning over additional tires to Cassidy and stated:

"Well, there were two reasons, one of them was that we were turning over sufficient tires to pay the amount of our indebtedness to the Mohawk Company. The second reason was that we

were in the tire business more or less, and we thought we could make arrangements whereby we could continue to sell the Mohawk tires, so that it was our endeavor to keep a representative stock. As near as possible we kept every size and every type of tire that we had in stock. We kept one or two of each size and description.” (Trans. p. 331.)

Cassidy 'phoned several times to defendants to get the stock up and as quickly as they could. (Trans. p. 333.)

The Fitzgerald inventory list, (Exh. 40), was not made up from the stock cards in the office. (Trans. p. 334.)

Testimony of *H. A. Auspach*—Exhibit 9, (Trans. p. 103), is a true copy of the letter sent to plaintiff at San Francisco. (Trans. p. 101.)

On page 102 of the transcript attorneys for plaintiff in their statement to the court stated that under the letter of September 18th,

“The only tires Munnell & Sherrill were authorized to turn over to Cassidy were such as were *agreeable to him.*”

In reference to this construction by the plaintiff of its own letter, we call the court's attention to the testimony of Cassidy to the effect that the tires that were

turned over to him *were agreeable* to him. (Trans. pp. 451, 455.)

When Mr. Auspach was first called to the witness stand he could not remember the exact date when the list (Exhibit 9), which he prepared was sent to San Francisco, but stated it was a short time after Fitzgerald wrote the letter of instructions of September 18th. Subsequently, defendants' Exhibit 41, (Trans. p. 325), was introduced, which was a letter written by Munnell and dictated to Auspach, (See EJM-HAA at the end of the letter, trans. p. 327), and in this letter of October 27th reference is made to the list of tires and serial numbers mailed on *September 21st*. Auspach was shown that letter for the purpose of refreshing his memory, and testified that a list, a copy of Exhibit 9, was sent to plaintiff in September, around September 21st. (Trans. p. 345.) Subsequent to the receipt of Fitzgerald's letter of September 18th, witness made an inventory of stock, took account of the stock that they were going to turn over to Cassidy, checked it himself, and the shipping clerk brought it down the stairs and placed it on the first floor. Witness received one 'phone call from Cassidy, who called several times. (Trans. p. 363.) Asked if any complaint was ever received from the American Tire & Rubber Company as to the amount of tires sent them, the quantity, the condition or the quality, he said: "No complaint whatever." (Trans. p. 364.) Cassidy never told defendants that he did not accept the tires, never intimated that he was not accepting them. Witness figured the cost of the tires for the credit to be allowed under the

letter of September 18th. The cost was based upon the last price list or discount, "Used the list of May 10, 1921." (Exhibit 3, Trans. p. 73.) The amount of the credit is \$9,814.00. (Trans. p. 372), (plus 20 cents as elsewhere noted). (Trans. p. 366.) The list of May 10th which they used and for which they claim credit, was *lower* than the price *actually paid* for the tires by defendants. (Trans. p. 367.) The *list used in figuring defendants' claim* for credit is the *same list as the plaintiff used* when it issued the credit on November 29, 1921, in the sum of \$1,079.25, (Exhibit 8), defendants themselves figuring the credit upon the same basis, to-wit, the price list of May 10, 1921. (Exhibit 34, trans. p. 368.) The price list of May 10, 1921, with 25 and 15% off is the replacement cost of the tires turned over to Cassidy. (Trans. p. 372.)

On cross-examination Auspach testified:

That he made a list (See Exh. 9) of the tires turned over to Cassidy with the serial numbers and sent it to the plaintiff at 'Frisco. (Trans. p. 390.) Being asked why he did not accompany the list with a statement showing the amount of credit they were asking, he said: "Well, it had never been customary in our office; we always sent them list, they sent us a credit memorandum after figuring it out." Witness answered a 'phone call by Cassidy who wanted to know when the stock of tires were going to be sent out. (Trans. p. 391.) Cassidy asked him when they were going to send the stock. Nothing was said as to the size, or quantity, or anything else.

Witness took the tires off the shelves which he sent to Cassidy and counted them. (Trans. p. 392.) Defendants kept a tire or two of every size, kept a representative stock and sent the rest. Defendants were to keep a certain number of tires, they were likewise to keep a representative stock, and all the rest of the tires were to be pulled out. (Trans. pp. 393-394.) The amount sent out figured the amount of \$9,814.00. When the tires were gotten down with the shipping clerk they were counted again. (Trans. p. 394).

The Pihl Transfer Company hauled the tires; they had never done any transfer work for the defendants. (Trans. p. 395.)

The tires delivered to Cassidy were figured on the price list of May 10th. They were turned over on the 21st of September, before the price reduction of November 15th came out. (Trans. 400-401.)

Testimony of *E. T. Munnell*. — The tires were turned over to Cassidy on the 21st of September, but three days before that he had been drawing on the stock. (Trans. pp. 420-421.) Defendants had two or three calls from Cassidy or his office asking when the tires were going to be ready. When they were ready, defendants undoubtedly 'phoned to Cassidy notifying them and a truck came after them. (Trans. p. 421.) It was not the defendants' truck; they did not pay for it; had never done business with that transfer company before. A list of the tires turned over to Cassidy was sent to San Francisco. (Exhibit 9.) (Trans. p. 422.)

The *pencil* notations on Exhibit 9 are in *witness's handwriting*. When he figured the cost to them at the time the transfer was made, September 21st, it was based on the list of May 10th, with 20 and 15% off plus the tax. As a matter of fact, the tires cost more than that, (as they were in part stock which was retained when the notes of December 2, 1920, were executed). (Trans, p. 422.)

The plaintiff gave credit to defendants for part of the tires turned over to Cassidy, and in doing so, "they used the same list and the same method of discount." The net amount of tires turned over to Cassidy was \$9,814 and some odd cents, and plaintiff gave them a credit of \$1,079.25. Cassidy never expressed any dissatisfaction with the tires turned over to him, made no objection to them; made no complaint or objection with reference to quantity, quality, or condition. (Trans. p. 424.) Nothing was ever said by him showing that he was dissatisfied in any respect with the tires sent to him, or anything in reference to the transaction. (Trans. p. 424-425.)

The replacement cost of the entire tires turned over to Cassidy is \$9,814.20. (Trans. p. 425.)

Fitzgerald never stated when he came to Portland and consummated this transaction that he did not have the power or authority to make this deal. (Trans. p. 426.)

We will hereafter consider from the correspondence

between the plaintiff and defendant with reference to this Cassidy deal, the point that Cassidy kept these tires for a while, sold from this stock, and later, when his carload had arrived, or was about to arrive from the East, containing the new flat treads, he shipped the stock received from defendants to the plaintiff at San Francisco. We will discuss the testimony of Cassidy hereafter, but at this point, that the court may have the question clearly in mind, we call attention to the fact that the letter of September 18th written by Fitzgerald gave defendants authority to turn over to Cassidy *any* Mohawk tires or tubes that they had in stock, and in *any* quantity or size agreeable to themselves and Cassidy. (Trans. p. 93.)

Cassidy, called as a witness *by the plaintiff* testified that he did not return the tires to 'Frisco because of any fault he found with the condition, or their salability, but on instructions from Fitzgerald, that the lot of tires he received from Munnell and Sherrill was *satisfactory* to him. (Trans. p. 451.)

On cross-examination he testified: That he *accepted* the tires from defendants which they delivered to him, and made no complaint to them as to quantity, condition or number, that the amount he got *was accepted by him*. (Trans. p. 455.)

With this testimony in mind, we wish to show the court that plaintiff attempts to alter the transaction.

SITUATION AFTER DELIVERY OF TIRES TO CASSIDY

Cassidy, after he had sold about 60 of the tires received from defendants, (Trans. p. 451), shipped the balance to 'Frisco on receipt of his cargo of new flat treads. On delivery of the tires to Cassidy, defendants wrote to the home office of the plaintiff a letter notifying them that:

“On instructions from Fitzgerald we have transferred *practically all of our stock* of Mohawk tires to the American Tire & Rubber Co. We are sending the numbers to San Francisco, asking that they credit our account for same.” (Trans. p. 314.)

Defendants also notified the company that Fitzgerald has under consideration their proposition for continuing the line by selling Mohawk tires in their retail store. This letter is acknowledged from the home office by letter of September 26th (Exhibit 37, trans p. 315), in which they acknowledge receipt of the letter, notifying plaintiff that they had transferred the *greater portion of the stock* to Cassidy pursuant to instructions from Fitzgerald; also that the matter of the continuance of the line in their retail store is a matter to be handled locally by Fitzgerald.

The company at San Francisco, the plaintiff, on October 12th, sends a red hot wire to defendants. (Exhibit BBB, Trans. p. 256.) In this telegram plaintiff at-

tempts to complain of the alleged condition of the tires, and says that the defendants "only had the authority of turning over to Cassidy the stock *he could use and retain.*" (Trans. p. 257.) The court will notice that this telegram is not in accordance with the transaction as it occurred, but seeks to *alter* the transaction. Defendants answered this telegram by another (Exhibit CCC, trans. p. 259), stating that they had returned no tires, but had turned all tires over to the American Tire & Rubber Co. under written instructions from Fitzgerald, and at the same time wrote plaintiff a letter. (Exhibit DDD, trans. p. 260.) In this letter defendants state that a large portion of their stock was turned over to Cassidy on written instructions from Fitzgerald, who knew what Cassidy was going to receive, and that he gave Cassidy the privilege of keeping the tires there at an extra discount, or returning them to the factory, stating that they had just called up Cassidy who verified this. They called attention to the fact that when Fitzgerald returns he will undoubtedly straighten out the matter. (Exhibit DDD is the same Exhibit as 38, trans. p. 319.)

On October 14th plaintiff writes a letter from 'Frisco to defendants. (Exhibit EEE, trans. p. 263.) This letter attempts to *ignore the agreement*, and attempts to *ignore the personal inspection* Fitzgerald had made, and states, "Therefore, the ownership of the stock *reverts* to you," that it is being held at 'Frisco. As a matter of law, how the ownership of this stock could *revert* to the defendants without the ownership prior thereto

having *vested* in *Cassidy*, we do not know. It is a clear statement that the ownership had passed from the defendants to another, in this case to Cassidy, and how ownership could revert without defendants' consent, as a matter of law, we do not know, and we do not believe the plaintiff can enlighten us.

Fitzgerald answers defendants' letter of the 27th, (Exhibit 41, Trans. p. 325), by a letter of November 5th, (Exhibit 39, trans, p. 320), and attempts to state that the matter of giving defendants credit was *contingent* upon Cassidy *retaining* the stock turned over to him, and states that inasmuch as Cassidy had not retained the stock "the stock reverts to your ownership."

Defendants answered this letter by a letter of November 9th, (Exhibit 12, trans. p. 285.) In this letter defendants tried to get plaintiff to see the agreement as it was actually made. The home factory at Akron on November 14th send defendants a letter, (Exhibit GGG, trans. p. 273). In this agreement the plaintiff attempts to rehash some of the *old* financial difficulties. The company attempts to construe the agreement made between plaintiff and defendants through Fitzgerald as follows:

"The permission which you were given to deliver tires to the American Tire and Rubber Company says very distinctly that the tires were to be delivered in any quantity or sizes that *might be agreeable to yourselves and Mr. Cassidy*. It is our understanding that he did not re-

quest or *agree to the return* of this lot of tires in question. And it was clearly understood at the time that this was merely permission for him to draw upon your stock for such goods as he might need, and that the permission was largely necessary on account of the matter of credit to him being involved." (Trans. p. 274.)

Sherrill answered this letter of the 14th by defendants' letter of the 18th. (Exhibit FFF, trans. p. 265.)

The court will note there is no intimation here that Fitzgerald did *not have authority* to do what he *had* actually done, and it is clear that the statement of plaintiff *upon the facts* is not correct, and, furthermore, the evidence offered by defendants conclusively establishes that the tires they turned over to Cassidy *were agreeable* to him, and when plaintiff called Cassidy as its witness Cassidy testified that he *did accept* the tires that defendants sent him.

It appeared that plaintiff wrote a letter to defendants on October 24th, but which does not seem to be offered in evidence. On October 27th, in the absence of Sherrill from the city, Munnell answered that letter. (Exhibit 41, trans. p. 325.) This letter calls the plaintiff's attention to portions of the transaction which they seem to ignore in their letter, and also asks for credit for the rebate due by the price decline of May 10, 1921, amounting to \$2,633.36, being the amount of the note in the third cause of action, also the credit memorandum for the tires turned over to Cassidy "as per list of

sizes and serial numbers mailed you on September 21st, said credit memorandum to be based at current list less the regular jobbing discount."

On November 29th credit memorandum in the sum of \$1,079.25, (Exhibit 8, trans. p. 98), was issued to defendants upon the tires turned over to Cassidy. The receipt of this credit memorandum was acknowledged and the balance demanded by defendants in letter of December 2nd. (Exhibit 16, trans. p. 290.) By letter of December 7th, (Exhibit 15, trans. p. 289), defendants demanded that the balance of the credit memorandum be sent them. This is followed up by letter of December 8th, (Exhibit 14, trans. p. 288). On December 28, 1921, credit memorandum is sent. With reference to the decline of November 15th, this is the claim heretofore referred to as a balance of \$249.44 defendants are entitled to. On January 23rd, (Exhibit 13, trans. p. 287), defendants tried to get proper credit by reason of the decline of November 15th.

On February 20th defendants sent plaintiff \$522.65 which, together with the sum tendered in the answer, and paid into court constitutes a complete discharge of all indebtedness from the defendants to the plaintiff, and was so found by the verdict of the jury.

REBUTTAL

To rebut the case as made by the defendants, the plaintiff read the deposition of Morris E. Mason with

reference to the question of Fitzgerald's authority, offered the testimony of I. H. Peck, who testified (Trans. p. 466), that he heard Sherrill state that in the pending litigation Fitzgerald would be put in a bad light with the Mohawk factory because he had made special agreements with the defendants which Sherrill said he was satisfied, were not known by the factory; called George K. Cassidy to prove what defendants claimed the real transaction was, and recalled W. G. Fitzgerald.

Testimony of *George K. Cassidy*. — Cassidy, the manager of the American Tire & Rubber Company, being called by the plaintiff, testified in substance as follows:

“I sent no request to defendants for any specific quantity of tires, sizes or style.” (Trans. pp. 447-448.)

Cassidy put all the tires in his store that were sent him by defendants and sold part of them after that. (Trans. p. 448.) The list, amounting to about 356 tires he shipped to the Mohawk Rubber Co. at San Francisco. He received his factory shipment on October 11th. He got passing reports on the factory carload of tires through the railroad company as they came in, and finding the car was getting pretty close to Portland, he shipped to 'Frisco the tires received from defendants. (Trans. p. 449.) Asked to state the condition of the tires when he received them from defendants, he said:

“Well, they were tires that looked as if they had been handled around quite a bit; wrapped in paper, and the paper had been pulled off of it; about half wrapped up; tires that are handled around pretty much paper comes off of them pretty easy.” (Trans. p. 450.)

Asked whether the tires were current sizes and style, he stated:

“There were lots of tires in there that I didn’t have any use for; I did not have any demand for *because I had very little dealers’ business.*” (Trans. p. 450.)

Asked if that was the reason he sent the tires to ‘Frisco, he said:

“No, not especially; I was kind of in between the two fellows. *My understanding was these tires were to go to ‘Frisco, whatever I had left.*” Trans. p. 450.)

He was asked the following questions by plaintiff and made the following replies:

“Q. I will repeat it. I want to know whether the reason for returning these tires to San Francisco was because of the *fault* you found with their condition?

“A. No.

“Q. Or *Salability*?

"A. *No.*

"Q. Why did you return them to San Francisco?

"A. *My instructions from Mr. Fitzgerald.*

"Q. When did you get those instructions?

"A. Well, in the course of the conversation when I took on the line of tires.

"Q. When did that conversation take place?

"A. Some time previous to September 20th; previous to the time I got the tires over from Munnell & Sherrill.

"Q. Was the lot of tires you received from Munnell & Sherrill *satisfactory to you?*

"A. *Yes, they were.* We sold some sixty out of them before the carload came.

"Q. Aside from the ones you sold, the others—were the rest of them satisfactory to you and acceptable?

"A. No, they weren't. At that time Mohawk was coming out with a new flat tread cord. We wanted the new latest tires. I had just signed up a new contract with Mohawk and I wanted new, fresh goods.

"Q. This conversation you had with Mr. Fitzgerald that you spoke of, was that at the time

that Munnell & Sherrill was there, or was that at some other time?

“A. I don’t believe Munnell and Sherrill were there. Between *Fitzgerald and myself personally*.

“Q. As I understand it, then, you sent them back because they were unsalable or not satisfactory or acceptable to you, because—there was a new style of tread being put on the market?

“A. That is one of the main reasons, yes; the other was that *any goods that Munnell & Sherrill shipped* over to the Cassidy Tire—the American Tire & Rubber, which was the name of the company at that time—*I was to accept* — that was my understanding; and whatever I sold out of there the Mohawk Company was to bill me for; and *whatever was left when the carload of new stuff arrived I had the privilege of shipping to 'Frisco, which I done*.

“Q. You say that was your understanding?

“A. Yes.

“Q. Did you have any conversation to that effect with anybody?

“A. Yes, I just told you I had a conversation with Mr. Fitzgerald.

“Q. Was that what he said to you?

“A. *Practically those words, yes. I have a*

number of letters substantiating that in my file.”
(Trans. pp. 451-2-3.)

Asked if it was the understanding that the stock which he was to take was to be current, salable stock, he said:

“No, *I don't believe so*; I don't think it was brought up at all.” (Trans. p. 453.)

On cross-examination he testified that in checking over the stock that Munnell & Sherrill had, he made the remark that there were some sizes that he absolutely would have no use for at all.

The real reason why the tires he did not use or sell were shipped to 'Frisco was because he was taking over the whole Mohawk line. His understanding was that Munnell & Sherrill were cleaning up and getting out of it. (Trans. p. 454.)

“Q. And you had an understanding there with Mr. Fitzgerald that the *stuff that Munnell & Sherrill had, whatever they wanted to send over to you, you were to take it?*

“A. Yes, sir.

“Q. *And you were to sell what you could, and what you couldn't sell you were to return to 'Frisco and they would give you credit?*

“A. *Just about word for word what Mr. Fitz-*

gerald told me. If it hadn't been that way I wouldn't have accepted them.

"Q. Wouldn't have accepted the agency?

"A. Wouldn't have accepted the tires.

"Q. Well, you did accept. *The tires were accepted by you, weren't they?*

"A. *Yes, sir.*

"Q. You didn't make any complaint to Munnell & Sherrill later with reference to the tires?

"A. *No, sir.*

"Q. Quantity, condition or number?

"A. *No.*

"Q. *The amount you got was accepted by you, wasn't it?*

"A. *Yes, sir.* (Trans. pp. 454-455.)

The carload from the factory came through more quickly than he expected, (Trans. pp. 455-456), and when he received those, the stock went to 'Frisco quicker than it otherwise would. If the factory had been short he would have sold from the stock, which defendants sent to him, for a considerable time. The Mohawk people at that time were coming out with a new tread. He sold 67 tires that he got from defendants. (Trans. p. 456.)

This testimony of *plaintiff's witness* is conclusive

evidence that defendants had full authority to turn over the tires which they did to the American Tire & Rubber Company, and that they should be given a credit based upon the list of May 10, 1920, in the sum of \$9,814.20 instead of a credit merely of \$1,079.25 which the plaintiff allowed them upon the list. (Exhibit 3.)

Mr. Fitzgerald's version of the Cassidy deal is as follows:

“Mr. Cassidy, the gentleman who testified here yesterday, was in San Francisco probably thirty days before my trip up here in September, and he dropped into my office and made inquiry regarding the Mohawk line, and told me that if ever we felt so inclined to make a change in our Portland connection, that he would be glad to give our proposition consideration. So I felt quite sure there was a possibility there of placing our line, and when I came up here on that trip in September

“Well, I informed Mr. Munnell & Sherrill that there was a possibility of our being able to make a connection with the Cassidy Tire Company, that is particularly to sell them large sizes, which were designated as truck sizes of tires, that is, tires of six, seven and eight inches cross-section, diameter, and I wanted to know if they had any objection to my selling Mr. Cassidy these sizes if I could, and they told me they didn't have any objection, to go to it. So with that I went over to see Mr. Cassidy, and as I remember, he gave me an order for about twenty-five or

thirty of these large sized tires. He says, 'Now, Fitzgerald,' he says, 'When these tires come in here I am going to put in service immediately, and if they are as good as I think they are, then we might come in later on that line.' So I wired to San Francisco to have these tires sent up here immediately, and they came up immediately by boat. I caught the train a day or two after I had gotten this order, and I went to Seattle, and from Seattle to Tacoma, so meantime these tires arrived in Portland, and Mr. Cassidy, after looking them over thought so well of them that he immediately endeavored and did finally get in touch with me over the long distance telephone; he caught me at Tacoma, and he said, 'If you will come back to Portland immediately,' he says, 'we are willing to take on the whole line. I like your merchandise, it looks good.' So I came back to Portland a day or two afterwards, and this final settlement was negotiated.

"Q. When you came back to Portland you had an interview with Cassidy, and ascertained through him that he would take on the entire line?

"A. I did. . . .

"Q. Well, during my conversation with Mr. Cassidy, before I went over to see Munnell & Sherrill—Munnell & Sherrill at that time were operating a retail store in conjunction with—that is separately from their wholesale establishment. Mr. Cassidy thought it would be an awfully good idea if we could retain Munnell & Sher-

rill as local distributors, so with that idea in mind I went down to see Munnell & Sherrill and told them of my conversation with Mr. Cassidy, and I suggested his proposal, and it was agreeable to them. So to find out just what stock Munnell & Sherrill did have, *Sherrill and myself took stock, or took his stock, and I am under the impression that we only took, that is physically, about half of the stock, and that was on the lower floor.* The rest of the stock, I think on the records that were contained on these sheets that he had with him yesterday, came from their card records, but on that point *I am not positive*, it might have been possible that we took the entire stock physically.

.....

“A. Yes. Now Munnell & Sherrill in their records, that is, the records we were looking over here yesterday, there were a lot of goods in there that were salable, and there were a lot of goods that were not salable, that is, at current prices, unless you wanted to go out and sacrifice them. So the following morning after that stock was taken Mr. Munnell and Mr. Sherrill, Mr. Cassidy and myself held a conference in Mr. Cassidy’s office.” (Trans. pp. 484-5-6.)

With reference to the stock to be turned over, Cassidy stated:

“And it was suggested that if this deal with Cassidy went through, Cassidy would relieve them of some of the stock, *which was naturally supposed to be salable stock, stock* that he could

sell. So they said that was perfectly agreeable to them." (Trans. p. 486.)

A motion was made to strike out what he *naturally supposed*, that he should tell the conversation of defendants and not state conclusions. He then said, "Well, *there was no specific stock specified.*" (Trans. p. 486.)

Cassidy wanted stock immediately.

"Q. Did you have any conversation with Munnell & Sherrill regarding the *character of the stock* that was to be turned over to Cassidy?

"A. No."

He said that Cassidy on examining the list which Fitzgerald had made said there was a lot of old stuff there he could not use; that he wanted current merchandise, popular stuff, (Trans. p. 487), but Fitzgerald fails to add what Cassidy had testified and which the defendants had testified, that Cassidy was to take the tires and whatever he had left he would ship to 'Frisco. Cassidy testified that it was not agreed that he should only take from defendants the current salable stock. (Trans. p. 453.) Fitzgerald testified that there were no definite instructions given as to what particular style, size or quantity were to be turned over by defendants to Cassidy. He said that it was agreed that Cassidy was to take over the Mohawk line, that he was to draw on defendants' stock until he got his factory supply of tires. (Trans. p. 488.)

It is apparent that there is an irreconcilable conflict in the testimony of Fitzgerald and plaintiff's witness, Cassidy, as well as in his testimony and the testimony of defendants and Auspach.

From the foregoing testimony it is very clear that the questions involved in this case were clearly questions for the determination of the jury. It is very clear to our mind that the jury were warranted in finding under the facts that the agreements were made with the defendants through Fitzgerald as contended for by the defendants.

QUESTION OF THE AUTHORITY OF FITZGERALD

In the motion for a directed verdict and in the assignments of error the appellant contends that Fitzgerald had no authority to make the agreements, which the defendants claim he did make on behalf of the plaintiff, and in support thereof will urge the testimony given by Mason and Fitzgerald as to Fitzgerald's authority and the letters written by Fitzgerald as to Fitzgerald's authority and the letters written by Fitzgerald and Mason to the defendants. We will not attempt to analyze this testimony upon which the appellant relies, as we shall hereafter point out, the testimony does show authority in Fitzgerald, but that the court may have before it succinctly the pages of the transcript upon which we presume the appellant will rely, we call attention to the pages wherein this question of authority is mentioned:

Transcript pages 119, 120, 121, 122, 123, 131, 140, 147, 188, 425, 426, 428, 429, 466, 470-472, 491-492-493-494, 503, 504, 505.

In the case of *Hinton vs. Roethlar*, 90 Oreg. 440, 177 Pac. 59, the Supreme Court of Oregon has held that agency may be proved by the testimony of the alleged agent. It has been frequently contended, and appellant may contend the same in this case, that the scope of agency of Fitzgerald cannot be proven by his testimony. This contention, however, is erroneous. In the case just cited, the supreme Court of Oregon (90 Ore. 440 at 447) found in reference to a like contention:

“This argument is based upon the contention that Adrian’s agency could not be proved by his testimony, though appearing with surprising frequency, is without actual support, for to repeat what was said in *Larkin vs. Carstens Packing Co.* (80 Ore. 104, 106) (156 Pac. 578), the right to prove a parole agency by testimony of the person who claims to be the agent is not even open to debate.”

The *Larkin* case cited held as follows:

“The rule which prohibits third persons from testifying to extrajudicial declarations made by the alleged agent before trial has no application to the instant controversy. Here an attempt was made to prove the non-existence of agency in a single transaction. The right to prove a parole agency by testimony of the person who claims to be the agent is not even open to de-

bate: *Spande vs. Western Life Indemnity Co.*, 61 Ore. 220, 232. (117 Pac. 973, 122 Pac. 38); 10 Ency. Ev. 14; 31 Cyc. 1651; 1 Am. & Eng. Ency. of Law (2 ed.), 969; 2 C. J. 933, 935; 1 Mechem, Agency (2 ed.) 291; *Wicktorwitz v. Farmers' and Merchants' Ins. Co.*, 31 Or. 569, 575 (51 Pac. 75). The alleged agent is likewise available as a witness to testify to the non-existence of an agency, and therefore, if Thomas Carstens was not acting for the Oregon corporation, it was competent for him to say so under the circumstances presented by the bill of exceptions and accompanying transcript of the testimony: 2 C. J. 935; *Dowell v. Williams*, 33 Kan. 319 (6 Pac. 600)."

It is very clear, therefore, that under the laws of Oregon it was competent for the *plaintiff* to *prove or disprove* the agency of Fitzgerald *by his own testimony*, and it was likewise competent for the *defendants* on cross-examination of Fitzgerald to *prove through him the fact of his agency and authority* to do the particular thing which he did do, and in addition to this, *an agent has the authority* to do the things *which are incidental* to the main transaction or settlement and within the general scope of such agent's authority. *Bauer v. Northwest Blow Pipe Co.* 75 Ore. 1, 6; 146 Pac. 129.

In the letter of November 10, 1920, Exhibit KK, ('Trans. p. 188), which appellant relied upon in the lower court, we find Fitzgerald writing to the defendants as follows:

“You must not forget that the writer’s authority with this company is limited to certain matters, such as the selling of goods, *territorial arrangements, etc.*, but when it comes to credits, return of unsold merchandise and things of that caliber, you are dealing with our Credit Department, because after we have made a sale of goods then the matter passes out of our hands to those of the Credit Department at Akron, and we have no authority to take action on matters pertaining to their department.”

In this letter of November 10th Fitzgerald was writing about the request of defendants to return goods to the plaintiff, not with reference to the power of Fitzgerald when he was making territorial arrangements and the transfer of the agency from the defendants to Cassidy. It is clear under the law that if Fitzgerald had power *to make territorial arrangements*, which included the taking of the agency away from defendants and giving it to Cassidy, that in the consummation of such territorial arrangements, to-wit, the surrendering of the territory held by the defendants and the giving of same to another, that Fitzgerald had all the powers which are *necessarily incident* to consummating such a transaction with reference to such territorial arrangements.

In the second place, upon the contention of appellant that there is no proof of authority, we have the testimony of W. G. Fitzgerald himself.

It is very clear from the evidence heretofore narrated that there is a sharp conflict in the testimony of the

plaintiff's witnesses and the defendants' witnesses as to what Fitzgerald actually agreed to do on behalf of his company. The defendants claim that he made the arrangements which we have pleaded. The plaintiff denies that he made the arrangements, and denies that he had the authority to make the agreement, so the first question is, is there any evidence that he did make the agreement, and, secondly, if he made the agreement, did he have authority to do so?. It is very clear that there is plenty of testimony in the record that Fitzgerald made the agreement, if the testimony of the defendants and their witnesses is to be believed, and the verdict of the jury shows that the jury did believe their testimony.

There being evidence that Fitzgerald made the agreements, which defendants claim he made, the question is, did Fitzgerald have authority to make such agreements? Fitzgerald testified that he had no instructions as to his *authority in writing*.

“Q. And as far as any persons dealing with you were concerned, they wouldn't know when they dealt with you, as to whether you were acting within or without the scope of your authority, unless you told them?

“A. Well, I don't know whether they would or not. I generally tell people just how far—I tell my customers just how far my authority extends.

“Q. In other words, when you don't do a thing you tell them you will have to take it up with the factory?

“A. *That is true.*

“Q. And if you do a thing, or consummate a certain transaction with them, you don’t tell them that you are doing something that you didn’t have authority to do, do you?

“A. Whenever I consummate a transaction with a customer, fully consummate it, it was not necessary for me to tell that.

“Q. In other words, *the things that you did---*

“A. *I was within my authority.*

“Q. *The contracts you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn’t you?*

“A. *I did.*” (Trans. pp. 491-492.)

In denying appellant’s motion for a directed verdict, the *trial court* very clearly remembered this testimony. In this motion the appellant made the same claim of lack of authority of Fitzgerald, and the court said:

“I think his authority is a question for the jury. *Mr. Fitzgerald testified that he had authority to make any contract that he did make.*” (Trans. p. 518.)

That the authority of an agent may be proved by the testimony of the alleged agent in court is well settled in Oregon. *Hinton v. Roethler*, 90 Ore. 440-447. 177 Pac.

59, 61, (3). *Larkins v. Carstens Packing Co.*, 80 Ore., 104, 106, 156. Pac. 578.

The right to prove the agency by the testimony of the agent is not open to dispute, therefore, when Fitzgerald testified that he had authority to make the agreement he did make, and the evidence being in conflict as to whether he made the agreement claimed, and the jury by its verdict having found as a matter of fact that he did make the agreement claimed, there is no question left for this court to consider as to the authority of Fitzgerald.

ASSIGNMENTS OF ERROR

It is fundamental appellate practice that the appellate court will on appeal review only the alleged errors which are specified in the assignments of error. It is further a fundamental rule that each assignment must particularly and separately set out each error asserted and maintained to be relied upon and urged. *Simpkins Federal Practice*, Rev. Ed., p. 190. The alleged error of law assigned must be sufficiently specific so that the understanding and attention of the court is at once arrested without being forced to search the record to determine what the issue is. *Simpkins Federal Practice*, *supra*, 190.

In plaintiff's motion for a new trial there is alleged as a basis therefor, "Misconduct of the defendants." (Trans. p. 532.)

In the assignments of error (Trans. pp. 544-546)

there is *no assignment* setting forth that error was committed in the trial by reason of the alleged misconduct of defendants or of attorneys for defendants. The only assignment of error even squinting at alleged misconduct is assignment IV, which is to the effect that:

“The court erred in denying plaintiff’s motion to set aside the verdict and judgment thereon, and to grant a new trial, which motion was based upon the following grounds:”

then setting forth the grounds upon which the *motion for the new trial* was based, one of which grounds set forth in the motion for new trial was alleged “misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter after the court had repeatedly ruled that such matters were immaterial and not within the issues.” (Trans. p. 546).

This assignment is clearly on its face not an assignment of error that there was misconduct of counsel for defendants in the alleged respect mentioned, but is merely an assignment of error to the effect that the court erred in denying the motion for a new trial for said alleged misconduct and insufficiency of the evidence. In other words, the assignment of error, *when analyzed*, assigns error *in denying the motion for new trial* and *does not assign error for alleged misconduct*, and, accordingly, the court cannot consider whether there was any such alleged misconduct, for the simple reason that it has not been assigned and the denial of a motion for new trial is within the exclusive jurisdiction of the trial court and

the appellate court will not consider alleged error of the trial court in denying the motion for new trial.

The following authorities clearly establish that the granting or refusal of a motion for new trial is within the sound discretion of the trial court and is not subject to review on a writ of error in the appellate court. *Goff v. U. S.*, 281 Fed. 822, 823, (C. C. A. 8 Cir.), citing authorities; *Yellow Cab Co. v. Earle*, 275 Fed. 928, 930, (C. C. A. 8 Cir.), *Cer. Den.* 255, *U. S.* 624, 66 L. Ed. 797; *Greenburg v. U. S.* 285 Fed. 865, 866, (C. C. A. 8 Cir.); *Slip Scharff Co. v. W. M. Filene's Sons Co.*, 289 Fed., 641, 646, (C. C. A. 1st Cir.); *Adams Express Co. v. Darden*, 286 Fed., 61, 68, (C. C. A. 6th Cir.).

Furthermore Assignment of Error number IV presents nothing for the determination of this court, as that assignment does not contain the record or the statements from the record which it is claimed were erroneous. It is necessary for this court and for the appellee to hunt through the record to ascertain what appellant refers to in assignment of error number IV. The assignment of error alleges that the motion for new trial was based upon alleged misconduct of counsel in bringing to the attention of the jury on numerous occasions alleged prejudicial matters. *What this alleged prejudicial matter is* the assignment does not show, neither does the assignment show that the alleged prejudicial matter was *excepted to*. It is necessary to hunt through the transcript and speculate what the appellant will urge on this

appeal in reference to this matter. As we understand Rule 11 of the rules of this court, it is necessary for the appellant in the assignments of error to set forth the substance of what occurred at the trial so that the court and appellee may understand what is being urged as error, and to enable the court to ascertain whether it is apparent that there is manifest error therein. The assignments of error do not comply with the rules in this respect, and therefore, present nothing for the consideration of this court. The alleged error in this case can only be ascertained by searching the record. The "full substance" of the error is not shown or any *substance* thereof. *Piper v. Cashell*, 122 Fed. 614, 616, (C. C. A. 9th Cir.) ; *Davidson S. S. Co. v. U. S.*, 142 Fed. 315, 318, (C. C. A. 8th Cir.) ; *City of Grafton v. Gentry Bros. Shows*, 240 Fed. 646, 648, (C. C. A. 4th Cir.) ; *H. E. Winterton Gum Co. v. Auto Sales Gum & Chocolate Co.*, 211 Fed., 614, 618, (C. C. A. 6th Cir.) ; *Cisco v. Looper*, 236 Fed., 336, 338, (C. C. A. 8th Cir.) ; *R. D. Cole Mfg. Co. v. Mendenball*, 240 Fed., 641, 643, (C. C. A. 4th Cir.)

Searching the record, we find on page 37 of the transcript the opening statement of counsel. As he was making his opening statement, the appellant objected to certain matters stated, and the court said, "Let him state his case." The plaintiff thereupon saved an exception to the statement and ruling. This opening statement was not evidence, and during the trial the court refused to permit defendants to offer evidence on the matter. After objection was made by appellant to the opening statement, it is apparent that *nothing further was said* in ref-

erence to that matter, no motion was made to strike out the statement, nor was any motion later made requesting the court to instruct the jury to disregard the statement, and when the court later on sustained an objection to the admission of testimony upon this line, it is very clear that the opening statement could have had no effect on a jury which was sworn to decide a case *under the evidence adduced* on the trial.

Though the motion for new trial alleges that there was misconduct by the defendants, and though there is no assignment of error alleging misconduct of defendants or of their attorneys (the assignment being as heretofore noted merely that the court erred in overruling the motion for new trial based upon alleged misconduct), and though we do not know what prejudicial matters at the time this brief is being written (which is before the service of brief of appellant) were brought to the attention of the jury, we will assume for the purpose of argument that appellant is relying upon alleged irregularities claimed to have occurred at the trial with reference to the condition of the Mohawk tires. It is fundamental that the court of appeals is an appellate court in this case only, and will review only errors properly presented to it.

NECESSITY OF EXCEPTIONS

It is a fundamental rule that alleged errors in rulings of law in the course of a trial are not reviewed by writ of error unless they are *excepted to* at the time the rulings are made, and incorporated into the record by

bills of exception or other equivalent proceedings, and as we contend, the errors excepted to must be specified in the assignments of error. It is fundamental that there must be an exception to an alleged erroneous ruling. *Ana Maria Sugar Co., Inc., v. Quinones*, 251 Fed. 499, 504, (C. C. A. 1st Cir.) ; *United Verde Extension Co. v. Koso*, 273 Fed., 369, 373, (C. C. A. 9th Cir.), (affirmed on writ of Certiorari, 254 U. S. 245, 251, 65 L. Ed. 246, 249), wherein the court said.

“Inasmuch as the record fails to show that the defendant urged an exception to the ruling of the court, there is no question for decision.”

Same rule is stated in *Wear v. Imperial Window Glass Co.*, 224 Fed., 60, 63, (C. C. A. 8th Cir.) ; and in *Goldfarb v. Keener*, 263 Fed., 357-359, (C. C. A. 2nd Cir.), wherein this Court after a discussion of appellate practice, said:

“It seems to be thought that an assignment of error should dispense with the necessity of exception. This is a fundamental mistake.”

Mound Coal Co. v. Jeffrey Mfg. Co., 233 Fed., 913, 918, (C. C. A. 4th Cir.) ; *International Lumber Co. v. U. S.*, 231 Fed., 873, 875, (C. C. A. 8th Cir.) ; *Netherlands American Steam Nav. Co. v. Diamond*, 128 Fed., 570, 574, (C. C. A. 2nd Cir.), (see second syllabus) ; *Chicago B. & Q. Ry. Co. v. Frye Bruhn Co.*, 184 Fed., 15, 18, (C. C. A. 8th Cir.) ; *Skeele Coal Co. v. Arnold*, 200 Fed. 393, 395, (C. C. A. 2nd Cir.).

In Oregon the rule is substantially the same as in the Federal Courts.

“Only error which is legally excepted to can be used to defeat a judgment. This has been the procedure in this court since *Kearny v. Snodgrass*, 12 Ore., 311; 7 Pac. 309.”

Bagley Co. v. International Harvester Co., 99, Ore., 519, 524, 195 Pac. 348, 349.

“It has been held since the earliest judicial times in this state that only for error legally excepted to will a decision of the circuit court be reversed. This precludes further examination of the instant case.”

Douglas Creditors Ass’n. v. Hutcheson, 81, Ore., 644, 645, 160 Pac. 539.

Searching the transcript we find that testimony of both the plaintiff and the defendant with reference to the quality of Mohawk tires was received without objection. In Exhibit O (Trans. p. 143) offered by *plaintiff*, there is a reference to the tires coming back from the customers. In exhibit P offered by *plaintiff* (Trans. p. 145) is another reference to the same thing. In Exhibit S, a letter from the plaintiff, offered by *plaintiff*, (Trans. p. 151) is a reference to the trouble with the treads, stating that in the *majority* of cases it was not the fault of the tires, clearly implying that in many cases it *was the fault* of the tires. Exhibit V, offered by *plaintiff* (Trans. p. 157) is a telegram showing the stock

is accumulating. In Exhibit KK, a letter from plaintiff and offered by *plaintiff*, is a statement that the Mohawk tires have survived the then conditions, and that they are *quality merchandise*. (Trans. p. 191.) Exhibit YY is a letter offered by *plaintiff*, wherein there is a reference to the tires being returned, (Trans. p. 223), and in the same letter (Trans. p. 224) defendants had enclosed a letter showing the reason that the tires were returned by one of their best customers, namely, Clark & Miles. Exhibit 21 is a letter from defendants offered in evidence *without objection*, (Trans. p. 297) enclosing letter from Clark & Miles. See also page 305 at 307, defendants' Exhibit 27, a letter to plaintiff from defendants received without objection. In it is a statement that the line had not proven satisfactory from a quality standpoint. (Trans. p. 307.) Exhibit 45 is a letter from plaintiff to defendants, received without objection. There is a statement to the effect that the quality of Mohawk products is superior and will be kept so. (Trans. p. 369.) This letter was received without objection. It should be noted that all of these letters and telegrams passing between the respective parties were received not only *without exception* but *without objection*. Defendants claimed rebate, the right to return goods, and a settlement of the note set forth in the third cause of action. Defendants considered that for the purpose of enabling the jury to ascertain the intrinsic probability that the plaintiff had made the agreement with the defendants relied on, that if plaintiff had turned over tires to the defendants, representing them to be of fine quality, and the tires had proven to be

defective, that that situation was a moral consideration which the plaintiff had in mind *when it did make the arrangement with the defendants* to take back tires and to give defendants credit on account of price decline when the defendants were compelled to take tires back by reason of the poor quality, and with this in mind, the plaintiff made the opening statement shown on page 37 of the transcript, and when objection was made nothing further was said.

On page 90 of the transcript defendants propounded a question to Sherrill, which the court of its own volition refused permission to answer. There is *no objection* by the plaintiff to this question, *nor is there any exception*. There is nothing here before the court.

As shown by the correspondence between the parties, Clark & Miles returned a great amount of tires. Defendants' Exhibit 21, (Trans. p. 297) was offered and received *without objection*. Plaintiff then asked the witness to explain what the letter from Clark & Miles sent to the defendants and referred to in Exhibit 21 was about. The questions were objected to and sustained by the court. *There is no exception*, and under the ruling of the court, where the *question was not permitted to be answered*, there is nothing for this court to pass on. Furthermore, there being no exception, there is an additional reason why there is nothing for this court to pass upon.

OFFER OF PROOF

At page 268 of the transcript, the defendants called

W. D. Miles and propounded a few questions to him, which it seemed to defendants were perfectly admissible under the correspondence, and for the purpose of showing matters of inducement, which caused the plaintiff to make the agreement claimed. Objections were made to the questions. An argument then took place before the court by one of the attorneys for defendants. The court (Trans. p. 267) in answer to the objections, stated: "I can't tell anything about it until I know what they expect to prove." Thereafter, defendants asked this witness, "How long did you handle the Mohawk tires?" This question was objected to. Defendants thereupon made *an offer of proof* to the court. The court denied the offer. Plaintiff then assigned as misconduct the remarks of the counsel to the court. (Trans. p. 271.) It seems, therefore, that plaintiff is claiming that a defendant has no right to make an offer of proof without being guilty of erroneous conduct.

Under the conformity statute (Revised Stat. Sec. 914; Comp. St. Sec. 1537), we understand that in the trial of a law action in the Federal court that the law of Oregon is the law applicable to the case. The court must remember that it was the duty of both parties to present the facts to the jury. At this stage of the trial it seemed necessary to the defendants to make a showing why Clark and Miles had returned such a large quantity of merchandise. The testimony was objected to, and the court sustained the objection. The defendants then thought, and still feel, that the court excluded testimony that the defendants were properly entitled to, and to

protect their rights, the defendants felt it necessary to make an offer of proof, in conformity with the usual practice.

Several circuit courts of appeal have held that it is *necessary* under Rule 11 to make an offer of proof in the trial court in order to save an exception as to rulings excluding evidence so that the appellate court may ascertain what the parties offering the evidence expected to prove, and that the trial court might know what they expected to prove and ascertain whether such proof was admissible, and the courts have held that in order to save an exception to an order excluding an offer of proof it is *necessary* to make a showing as to *what the proof will be*. *Victor Talking Machine Co. v. Straus*, 280 Fed., 717, 718, (C. C. A. 2nd Cir.); *Sun Publishing Co. v. Lake Erie Asphalt Block Co.*, 157 Fed., 80, 82, (C. C. A. 8th Cir.); *Camp Mfg. Co. v. Beck*, 283 Fed., 705, 6, (C. C. A. 4th Cir.). The same rule is stated in *Shauer v. Alterton*, 151 U. S., 607, 616, 38 L. Ed. 288; and in *Buckstaff v. Russell*, 151 U. S., 626, 636, 39 L. Ed. 292, 296, the same rule is given with some qualifications, and in *Kansas City S. R. Co. v. Jones*, 241 U. S. 181, 2, (60 L. Ed. 943, 945), the Supreme Court of the United States calls attention that where there is a state law requiring a statement of what it was expected to prove, it is necessary to make such a statement with an exception taken in order to present the question for review. Accordingly, in this matter, it is clear that the proper practice where the court excludes testimony is determined by the Oregon law.

In Oregon it has been held in many cases that it is necessary where the court sustains an objection to a question that unless the question so clearly indicates what the expected answer will be, that it is necessary in order to preserve the question of correctness of the court's ruling, to make an offer of proof. The following cases exemplify the rule. In *Booth Kelley Lumber Co. v. Williams*, 95 Ore., 476, 482-4, 188 Pac. 213, 215, the court said that the offer of proof must be of evidentiary facts sufficiently specific to enable the court to determine if there was any error in excluding it, citing *Hill v. M. C. Crow*, 88 Ore., 299, 309; 170 Pac. 307, 309; which case in turn cites *Columbia Realty Investment Co. v. Alameda Land Co.*, 87 Ore., 277, 293, 296, 168 Pac. 440. In this case the court said that the practice in Oregon is to incorporate in the bills of exceptions the offer of proof:

“An offer of proof should state facts rather than conclusions, its language should not be vague but distinct, not general, but specific. It is not sufficient that it state the ultimate facts in language appropriate to a pleading, but the *evidentiary facts* must be set out.”

In *Ashmun v. Nichols*, 92 Ore. 223, 231, 178 Pac. 234, 236, the court held that,

“It is necessary, to make the matter available for review on appeal, to make a showing or offer as to what would have been the proof if the witness had been called to testify.”

Accordingly, it was only *not error* for the defendants to make an offer of proof as to what they expected the witness Miles to testify, but it was the *duty of defendants*, in order to preserve the question of error of the court in excluding the testimony, to make such an offer of proof, and how there could be misconduct in doing that which the Supreme Court of Oregon says must be done, we do not understand. Furthermore, the court sustained the objection to the offer of proof and would not permit the evidence to go in, and surely this ruling in favor of appellant cannot now be assigned as error against it.

On page 406 of the transcript the defendants asked the witness how much stock of Clark & Miles was returned to them. This question was objected to, an argument was made to the court why it should be answered, and the court *sustained* the objection. *No exception* was taken and there is nothing before the court to review. No erroneous rule of the court can be pointed out. Furthermore, the correspondence offered *by the plaintiff*, we think, clearly should have rendered the answer admissible.

On page 446 of the transcript a question was asked a witness and objection taken, and an emphatic ruling of the court sustained the objection. No ruling of the court against appellee can be found. There was *no exception* taken and there is nothing for this court to review. Accordingly, this contention of appellant resolves itself into merely three points: In the record, page 37 of

the transcript, where a preliminary statement was made and objection offered, overruled by the court and nothing further said; on page 268 of the transcript, the calling of a witness, the propounding of questions, an objection thereto, an offer of proof and the sustaining of objections by the court, then an assignment that the offer of proof was misconduct; (Trans. p. 272); on page 406 of the transcript, the propounding of a question to a witness, an objection thereto, an offer of proof, the sustaining of the objection, and an assignment of misconduct as to the offer of proof. Wherein under the authorities, there can be error in making a statement to the court and an argument to the court as to why certain proffered evidence is competent or relevant, we do not know. The counsel for defendants made the kind of offer which the practice in Oregon requires should be made, and which many Federal decisions say is the proper method to preserve an exception. If the verdict in this case had been against the defendants, it is clear that the defendants were entitled to know whether the evidence which they wished to offer was competent or not, and in order to preserve that question for review in event the verdict had been against the defendants, it was necessary for the defendants and their attorneys, in the preservation of defendants' rights, to make an offer of proof. On this branch of the case, however, we wish to again urge that the *assignment of error presents nothing for this court to review*. If it is necessary, under the law, to preserve the correctness of an order excluding testimony, to make an offer of proof, so

that that offer of proof may go into the bill of exception and be set forth in the assignment of errors, so that the court upon the inspection of the assignment of errors can ascertain whether the proof should be admitted, clearly no less a stringent law must be imposed upon appellant here in requiring it to set forth in its assignment of errors specifically what occurred at the trial, so that the court upon inspection of assignment can ascertain whether there was error. Rule 11 of this court clearly contemplates that that is required. Appellant has not complied with Rule 11 in reference to its fourth assignment, and there is nothing before the court to review. Appellant has not set forth in its assignment of errors wherein the alleged misconduct occurred nor in what it consisted. What the alleged misconduct it complains of is, we can only guess, and we expect *we will be informed when we get the brief of appellant*. The assignments of errors, however, is the place where the appellant is required to set forth the full substance of the error relied on and it has not done so.

ASSIGNMENTS NOT SEPARATELY STATED

In assignment of error numbered I, (Trans. p. 544), appellant urges that the court erred in that the evidence in the record is insufficient to support the verdict for three reasons, namely:

1st. There is no evidence that W. G. Fitzgerald had authority to make and bind the plaintiff by said contracts;

2nd. There is no evidence in the record to establish the contracts set forth in defendants' answer;

3rd. The contracts attempted to be established by defendants are at variance with the contracts set forth in the answer.

In assignment of error numbered II, appellant alleges that the court erred in overruling the motion for directed verdict, and that there was no evidence to establish the defense set forth in the answer for the same *three reasons* above specified.

In assignment of error numbered III, appellant alleges that the court erred in admitting testimony of conversations with W. G. Fitzgerald as evidence of contracts alleged to have been made with him because there was no evidence establishing the scope of Fitzgerald's authority to bind the plaintiff.

An inspection of these assignments shows that the reasons assigned are in triplicate, and the assignments stating wherein the court erred are not separately stated.

In the case of *Savage v. U. S.*, 270 Fed. 14, 20, (C.C. A. 8th Cir.), the first assignment of error relied on related to rulings upon admission in evidence of portions of testimony of agent's different witnesses relating to this subject. The second assignment related to error in admitting in error 100 different exhibits. The court said:

“This is a violation of Rule 11 of the Court of Appeals rules, which requires that each error shall be set out separately and particularly,”

citing *Davidson S. S. Co. v. U. S.*, 142 Fed., 315, 318; *Empire State Cattle Co. v. Atchison T. & S. F. Ry. Co.*, 147 Fed., 457, and *Smith v. Hopkins*, 120 Fed., 921, 923. The cases cited clearly bear out the rule stated in the *Savage* case.

In *Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, 147 Fed. 457, 461 (C. C. A. 8th Cir.) the court said with reference to one of the assignments of error: That the trial court erred “after refusal of plaintiff’s request for a peremptory instruction in refusing to charge the jury, at plaintiff’s request, instructions numbered 1 to 13, inclusive. Under repeated decisions of this court applying the 11th rule, this assignment presents no question challenging the attention of the court to the merits of the several requests.” See also *Herrington v. U. S.*, 267 Fed. 77, 104 (8), (C. C. A. 8th Cir.).

QUESTION OF VARIANCE

Considering the three points upon the merits alleged in assignments numbered 1 and 2, the recitation of the evidence heretofore made has sufficiently disposed of the first claim that there is no evidence that Fitzgerald had authority to make and bind plaintiff by the contracts alleged, and the second point that there is no evidence in the record to establish the contracts set forth in de-

defendants' answer. This second point is clearly analagous to the third to the effect that there is a variance.

Upon this question we submit that the record shows that there was no motion to strike or any demurrer to any portion of defendants' answer, and in the second place, there was no objection to the testimony offered by the defendants other than a few sporadic objections. It is well settled that objections on the ground of variance between averment and proof must be taken when the evidence is offered, *otherwise it will be deemed to be waived*.

If the evidence is sufficient to support the verdict, as it was in this case, mere defects of averment in the pleadings are cured. *Preiss v. Zitt*, 148 Fed., 617, 618, (C. C. A. 8th Cir.), citing *Nashua Savings Bank v. Anglo Amer. Co.*, 189 U. S., 221, 231, 47 L. Ed. 782; and *Roberts v. Graham*, 6 Wall. (U. S.) 578, 18 L. Ed. 791; *Thompson Sterrett Co. v. Fitzgerald*, 149 Fed., 721, 723, (C. C. A. 7th Cir.).

In *Phoenix Securities Co. v. Dittmar*, 224 Fed. 892, 895-6 (C. C. A. 9th Cir.), this court said:

"It is contended that it was error to admit evidence of reasonable value of the plaintiff's service for the further reason that no evidence was adduced to prove the express promise to pay such reasonable value which was alleged in the second county, and that therefore there was variance between the complaint and the evidence

which was so received and objected to. But, if there was such variance as is now alleged, the right to predicate error on the admission of such testimony *was waived* by the defendant's failure to *present specifically that ground of objection* at the time when the testimony was offered."

And in *Twin City Fire Ins. Co. v. Stockmen's National Bank*, 261 Fed. 470, 474 (C. C. A. 9th Cir.), this court said:

"If there was variance between the allegations of the complaint and the proofs, that fact cannot avail the defendants in this court, for the reason that no such variance was brought to the attention of the court below. *Roberts v. Graham*, 6 Wall. 578, 18 L. Ed. 791; *Insurance Sav. Bank v. Anglo-American Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; *Preiss v. Zitt*, 148 Fed. 617, 78 C. C. A. 56; *Phoenix Securities Co. v. Dittmar*, 224 Fed. 892, 140 C. C. A. 336."

It is well settled that a pleading is aided by the verdict where the pleading is not attacked by demurrer or otherwise, in the court below. *Duluth R. R. Co. v. Speaks*, 204 Fed. 573, 576. (C. C. A. 8th Cir.)

Evidence Sufficient

The law as to variance settled by verdict and the effect of a motion for directed verdict which is denied, where the verdict of the jury is against the parties requesting the directed verdict, are set forth in the following authorities by the Supreme Court of Oregon:

In *Sherman Clay v. Buffman & Pendleton*, 91 Ore. 352, 360, 179 Pac. 352, a case involving the question of the authority of a managing agent of plaintiff, there was a motion for a directed verdict, the court said:

“A motion for a directed verdict is equivalent to a demurrer to the evidence. It *admits the truth* of the evidence given by the party against whom the verdict is directed and also such references and conclusions as are reasonably deducible therefrom: *Ruber v. Miller*, 41 Ore. 103, (68 Pac. 400),” (p. 360, 171 Pac. 241).

In *Ridley v. Portland Taxicab Co.*, 90 Ore. 529, 533-5, 177 Pac. 429, 430-1, the court said:

“A motion for an involuntary judgment of nonsuit is in the nature of a demurrer to the evidence for the plaintiff: *Brown v. Oregon Lumber Co.*, 24 Ore. 317 (33 Pac. 557). The judge is called upon to decide whether there would be a ‘want of evidence to support’ a verdict for the plaintiff even though all the evidence for the plaintiff is assumed to be true, Section 183, L. O. L. A motion for a directed verdict presents the same question for decision as does a motion for a judgment of nonsuit; but the plaintiff is, of course, entitled to the benefit not only of his own evidence, but also to the benefit of any evidence favorable to him though introduced by the defendant: *Huber v. Miller*, 41 Ore. 103, 110 (68 Pac. 440); *Merrill v. Missouri Bridge Co.*, 69 Pr. 585, 593 (140 Pac. 439). While a motion for a nonsuit and a motion for a directed verdict give rise to the same inquiry the result of an

approving decision is not the same. A judgment of nonsuit operates merely as a dismissal of the action: 184 L. O. L.; *Mallory v. Marshall Wells Hdw. Co.* *ante*, p. 303 (175 Pac. 661); but a judgment on a directed verdict concludes the controversy: *Huber v. Miller*, 41 Ore. 103, 110 (68 Pac. 400). A motion for a directed verdict as well as a motion for an involuntary judgment of nonsuit challenges the legal sufficiency of the evidence. Each of these motions performs the same function in connection with the evidence as does a demurrer in connection with a pleading, but neither of these motions is designed to perform the function of a demurrer to a pleading.

“Even though a complaint omits some material allegation a motion for a directed verdict, based upon the fact of such omission, should be denied, especially where the objection can be cured by an amendment and the plaintiff’s evidence, if true, makes a case against the defendant. (Citing cases.)

“Of course, a different question would be presented and a different result might follow if the evidence conclusively showed that the plaintiff was without a cause of action. It must be remembered that a judgment on a directed verdict concludes the controversy; and hence if it is permissible to direct a verdict for a defendant merely because the complaint has omitted some *material allegation*, which can be supplied by an amendment, and in despite of the fact that the plaintiff has offered evidence which would be sufficient to support a verdict for him *if accompanied by a*

good instead of a bad complaint, it would result in defeating the purpose of amendments and frequently would end in the complete denial of a right by the simple but indefensible act of closing the doors to the truth. If therefore, the record brought before us contains evidence which, when accompanied by a good pleading and if believed by a jury, would be legally sufficient to support a verdict for the plaintiff, then it was error to allow the motion for a directed verdict on account of any failure of the complaint to allege that the defendant knew or ought to have known that it furnished a defective wrench. *Ridley v. Portland Taxicab Co.*, 90 Ore. 529, 533-535, 177 Pac. 429, 430-431." (Court accordingly held that it was error to direct a verdict for failure to make allegation stated.)

The Ridley case was followed in *Emmons v. Southern Pacific Co.*, 97 Or. 263, 295, 191 Pac. 333, 343.

The Ridley case is cited in *Parks v. Keeney*, 105 Or. 277, 279, where motion allowed and case as proved showed neither the action pleaded *or any action at all*; 209 Pac. 497; the exception to the rule being accordingly invoked.

In Oregon, Article VII, Section 3C of the Constitution, provides that:

"No fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict."

Under this provision the state appellate court is precluded from considering questions of fact where there is *any* evidence supporting the verdict. *Kahn v. Home Tel. & Tel. Co.*, 78 Ore. 308, 317; 152 Pac. 240, 242; *Reed v. National Hospital Assn.*, 106 Ore. 471, 482; 212 Pac. 537, 541 (3); *Sou. Ore. Orchards Co. v. Bakke*, 106 Ore. 20, 25; 210 Pac. 858, 860 (1); *Mitchell v. S. P. Co.*, 105 Ore. 310, 317; 209 Pac. 718, 720 (4); *Derrick v. Portland Eye, Ear, Nose & Throat Hospital*, 105 Ore. 90, 98 (4); 209 Pac. 344, 347 (4).

In *Doherty v. Hazelwood Co.*, 90 Ore. 475, 478; 175 Pac. 849, the Supreme Court of Oregon said:

“It is axiomatic that a motion for a directed verdict must be overruled, and the question at issue must in the first instance be submitted to the jury *if there is any evidence* which the jury is entitled to consider as against the ruling party.”

Thus in Oregon the rule is that if there is any evidence to support the verdict, the verdict must stand.

In *Toledo, St. L. & W. R. Co. v. Howell*, 191 Fed. 776, 780-1 (C. C. A. 6th Cir.), the court held that the weight of evidence is a matter which the appellate court of the United States has no power to consider, and that a motion for directed verdict must be overruled where the testimony presented by the plaintiff, if believed by the jury, will support the petition, citing authorities from U. S. Supreme Court and other Federal courts.

In *Hobbs v. Kiser*, 236 Fed. 681, 682 (C. C. A. 8th Cir.), the court said:

“The well established rule is that on a motion for a directed verdict the court must take the view of the evidence most favorable to the adverse party.”

Again on the same page the court said:

“Another rule equally well established is that only when all reasonable men, in the honest exercise of a fair, impartial judgment, would draw the same conclusions from the facts which condition the issue, it is the duty of the court to withdraw that question from the jury,”

citing numerous authorities from the appellate and federal courts supporting the text. The court found the evidence was conflicting, and the court said, under Section 1011, Revised Statutes (Compiled Statutes 1913, Sec. 1672), “the jury’s findings of facts on conflicting evidence is conclusive.” (p. 685).

In this connection we call attention of the court that the charge of the court to the jury is unimpeachable as a matter of law. The appellant is entirely satisfied with the instructions given to the jury; no exception was taken to the instructions to the jury, and there is no assignment of error based upon the charge to the jury, and as stated by the Circuit Court of Appeals of the 6th Circuit in the case of *Carolina C. & O. R. Co. v. Stroup*, 239 Fed. 75, 79, wherein the court held there was no error in refusing to direct a verdict that:

“We are the more content thus to dispose of the case because of the company’s failure either to complain of the charge of the court or to in-

clude it in the record; for such an omission gives rise to a presumption that the court instructed the jury as favorably for the defendant as the merits of the defense deserved."

In this case the appellant does not complain of the charge of the defendant to the jury, and we must presume that the appellant is satisfied that the court's instructions to the jury were as favorable for the plaintiff as the merits of the case deserved.

There is one other fundamental reason why the plaintiff is bound by the contract which Fitzgerald made, and that is because the appellant has ratified the contracts made by Fitzgerald by accepting the benefits of such contracts with knowledge of the facts.

Fitzgerald, on behalf of his company, agreed that the notes set forth in the third cause of action should be deemed satisfied. With this agreement in mind, the parties undertook to transfer defendants' stock to Cassidy, and defendants transferred to Cassidy stock sufficient to balance the account. If the defendants had not made the contract with the plaintiff for the consummation of said note, it is clear that the defendants would have been empowered to turn over to Cassidy additional tires according to the value of said note. That they did not do so is the strongest evidence of their understanding of the contract. Fitzgerald was familiar with the situation, and he made the contract providing for the transfer of the territory to Cassidy and the transfer of the stock of tires from the defendants. Thereafter, the

plaintiff with full knowledge of what has been done, issued credit to the defendants *for a portion* of the stock turned over. In other words, the plaintiff accepted as much of the contract as it thought was beneficial to it, and attempted to repudiate the remainder. The correspondence from the home office does not deny the power of Fitzgerald to make the *contracts* at the time of the transfer, which defendants claim *he did make*, but merely claims that he made the kind of a contract which the defendants claim he did make. It is very clear from the testimony of defendants, and from the testimony of their witness Auspach, and from the testimony of plaintiff's witness, Cassidy, that the contract was made as the defendants claim. The letters from the home office written after September 18, 1921, do not repudiate Fitzgerald's authority but simply urge that Fitzgerald did not make the kind of agreement which the evidence overwhelmingly shows that he did make. Exhibit 37 (trans., p. 315) acknowledges that defendants had transferred the greater portion of their stock to the American Tire & Rubber Co., and states that the matter of handling the line in Portland in the future is a matter which will be left to Fitzgerald. (Trans. p 317.) Exhibit GGG (trans. p. 273), dated November 14, 1921, is the letter attempting to back up Cassidy. Thereafter, and on November 29, 1921, a credit memorandum for \$1,079.25 is issued to defendants. It is clear that the plaintiff ratified a portion of the agreement, and that being true, they are deemed to have accepted and ratified the entire agreement, for if a

principal elects to ratify a part of an alleged unauthorized act of an agent, he must ratify the whole. The principal cannot take the benefit of an alleged unauthorized contract without bearing its burdens. *Bauer v. N. W. Blow Pipe Co.*, 75 Or. 1, 5; 146 Pac. 129, 139 (1-4), citing cases; *Depot Realty Syndicate v. Enterprise Brewing Co.*, 87 Ore. 560, 575 (7), 171 Pac. 223-224 (2), citing among other authorities, 2 Corpus, p. 504, Section 124 and notes.

In Oregon it is good pleading to allege that an act was done by the defendant and it is competent to prove that averment by showing that the act was merely done by the agent of defendant thereunto duly authorized, or that it was afterwards ratified by the defendant. *Marsters v. Walker*, 89 Ore. 526, 529 (2), citing cases. 174 Pac. 1164 (2); *Hinton v. Roethler*, 90 Ore. 440, 448; 177 Pac. 59, 61 (4). The same rule is stated in *Scandinavian National Bank v. Wentworth Lumber Co.*, 101 Ore. 151, 157; 199 Pac. 624, 626 (5).

The Marsters case also reiterates the same rule that ratification subsequently by a principal with knowledge of the facts is equivalent to prior authorization. We claim under the records herein that the appellant with knowledge of the facts ratified a portion of Fitzgerald's acts. That being true, it is estopped from urging want of authority.

REPLY TO BRIEF OF PLAINTIFF IN ERROR

Most of the arguments presented by plaintiff in

error have been answered in the foregoing brief written before the receipt of plaintiff's brief, and we will not reiterate what has there been stated. We wish merely to briefly call to the attention of the Court some of the statements set forth in plaintiff's brief.

We cannot find that plaintiff makes any claim in its brief that there is any variance, and we shall accordingly take it for granted under the well settled rule that an error assigned but not urged in the brief is deemed abandoned.

Plaintiff's brief resolves itself into three questions. The substance of the first two assignments set forth on pages 1 and 2 of the brief, when analyzed, is to the effect *only* that there is no evidence that W. G. Fitzgerald had authority to make and bind the plaintiff by the contracts set forth in the answer. On page 4 of the brief, plaintiff in error gives its interpretation of Exhibit 7. This interpretation is so utterly at variance with the testimony shows and with the instrument itself that we will not make any further comment than what we have heretofore stated.

The last paragraph on page 5 and running on to page 6 seems to state a contention that there was *no authority* in Fitzgerald to make the Cassidy deal in the form that we claim the evidence conclusively shows it was made. We feel that the unconscionable attitude of plaintiff in error is nowhere more plainly evidenced than in the improper attempt to repudiate the contract that Fitzgerald made with the plaintiff with reference to

turning over tires to Cassidy. The evidence is so overwhelming that plaintiff had the right to turn over to Cassidy the tires which they did turn over to him and to obtain credit therefor that the attempt to repudiate this agreement on the ground of want of authority appears exceedingly technical and trivial, as well as an unconscionable attempt to repudiate a clean-cut agreement, and it illustrates why the jury did not believe everything that plaintiff's witnesses testified to. No phrase can be found in a letter sent from Akron, Ohio, with reference to the Cassidy deal which seems to imply any limit upon the authority of Fitzgerald to make the Cassidy deal. As we have heretofore stated, the only thing contained in those letters was an attempt to back Fitzgerald up in his subsequent claim that he did not actually make the agreement which the letter and evidence plainly shows he did make. Furthermore, the testimony unqualifiedly shows that Fitzgerald had power to make "territorial arrangements." Under that express power he clearly had the right to make the Cassidy deal in the form the evidence shows that it actually was made.

The larger portion of plaintiff's brief is devoted to commenting upon portions of certain letters sent by Fitzgerald and by the Akron office to the defendants prior to the making of the notes of December 2, 1920. We have heretofore shown that the business relations of the parties are clearly divided by the period preceding the execution of these notes and by the contracts made at the time of the execution of the notes and the business

relations subsequently thereto. Statements of the plaintiff made prior to that time with reference to the authority of Fitzgerald cannot be considered as proof that Fitzgerald had no authority when the identical individual who, it is claimed made these limiting statements, subsequently by making the agreements which might be inconsistent with his prior statements, conclusively showed that he claimed then and had authority to do the things which he actually did do and to make the contracts which he did make. The evidence shows that any claim of limitation of authority of Fitzgerald *was never placed in writing. His authority was determined by parol* and hence when Fitzgerald orally agreed to do certain things, the defendants were clearly entitled to believe that he had apparent authority to make the agreement which he actually did make. The plaintiff in error would seek to impose upon a person dealing with the Pacific Coast manager the obligation of asking that person each time they dealt with him: "Have you the authority which you now appear to have and which you ostensibly seem to have in making the agreement which you now make?" The law requires no such questioning of the authority of the general agent.

On page 54 of the brief plaintiff in error attempts to explain away the testimony given by W. G. Fitzgerald and shown on pages 491 to 493 of the transcript of record, claiming first of all, that this testimony should be read in connection with the other testimony given by Fitzgerald, and that consequently his own evidence as to his authority is not binding upon the plaintiff.

In reference to the first contention upon the theory of the plaintiff in error, no Court could ever rely upon any statement of a witness if that statement though clear and unqualified must be considered qualified by everything that the witness has testified to. There was nothing in the examination of Mr. Fitzgerald to indicate that he was qualifying his testimony. The questions were clearly put to him and were as clearly answered. The answers were clear and unequivocal, and the attempt of the plaintiff and its counsel to read a qualification into testimony where none exists is destructive of the ordinary method by which courts and juries arrive at facts from the answers of witnesses. Courts cannot read into answers any qualification where the answers themselves are unqualified.

In reference to the second contention that the evidence of Fitzgerald does not bind the plaintiff, we have already seen that the agent may testify with reference to his agency. No objection was made to any question or answer of the witness, W. G. Fitzgerald, and when he testified that he, as Pacific Coast manager, had authority to do what he did do, and make the contracts he did make, and acted within his authority it was certainly competent evidence to go before the jury to determine whether he did have authority to make the agreement which the defendants claim he did make. If his testimony is not conclusive upon the plaintiff as plaintiff now asserts, it was certainly competent testimony to be considered by the jury in determining the scope of Fitzgerald's evidence. Fitzgerald did not testify as to

his *opinion* as to the extent of his authority. He testified as to the fact of his authority. He testified plainly, clearly, concisely and emphatically. Who should know the authority of the Pacific Coast manager better than such manager himself. Plaintiff made no objection at the trial; he can urge none now. The jury believed that Fitzgerald made the agreements claimed by the defendants and they believed him when he testified that he had authority. The Court clearly instructed the jury upon the question of the authority of an agent and there was competent evidence in the record that Fitzgerald had authority to make the agreements which the defendants claim he made; that being true, the question was clearly before the jury and its decision is final.

The other question which the plaintiff in error urges in its brief is the question of alleged misconduct of the attorney for the defendants. We reiterate that this question is not before the Court. Assignment number 3, shown on page 2 of the brief of plaintiff in error is an assignment of error in failing to set aside the verdict and judgment and to grant a new trial, which, as we have seen, is not reviewable. It is not an assignment of misconduct. Plaintiff in error interprets it in its own assignment of error number 4 on page 11 of its brief and on page 81 of the brief. On page 11 of the brief plaintiff states: "The motion for a new trial should have been granted" on account of the misconduct of defendants' counsel, etc. This is clearly an assignment of error in *denying a new trial*, and not reviewable. On page 81 of the brief plaintiff in error states: "Plaintiff

made a motion for a new trial on the ground of this misconduct, *and the refusal to grant the new trial is assigned as error.*" This statement by plaintiff clearly emphasizes what we have heretofore alleged, that assignment number 4 presents only the question: "Did the Court err in refusing to grant a new trial?" The ruling of the Court in this respect, as we have heretofore seen, is not reviewable and the matters which plaintiff in error urges with much vehemence on pages 60 to 81 of this brief are not properly before this Court because not assigned as error.

In the second place the Court has to examine pages 60 to 81 of the brief of plaintiff in error to find out what it is that is complained of as error. There is not a single word in assignment of error number 4, as we have heretofore noted, which indicates with the certainty required by the rules of this Court the alleged errors relied upon. How can the Court from an examination of error number 4 determine what the plaintiff in error will rely upon unless it examines the whole transcript, or is enlightened by the brief of plaintiff in error? Under all the decisions, interpreting rules similar to the rules of this Court, it is clear that the plaintiff in error has not assigned, under Rule 11, the error which it now asserts. The error is neither *separately* nor *particularly* asserted, nor *asserted at all*. Neither the *full substance* of what it is claimed was erroneously omitted or rejected is set out, *nor any of the substance thereof*. Furthermore the alleged error claimed in the brief is not an error of the Court at all. The plaintiff in error has not

complained of any ruling of the Court in any respect whatever outside of the ruling on the opening statement. All the rulings of the Court were in favor of the plaintiff in error. Furthermore, plaintiff in error seeks to allege error for matters not excepted to. The words "exception saved," shown in the fifth line on page 66 of appellant's brief was an exception taken by the *defendants in error* to the refusal of the Court to permit them to offer evidence which they considered competent.

Finally we submit that the matters referred to by plaintiff in error in its brief were not only not errors, but that the Court should have permitted the defendants in error to offer the testimony which they desired to offer.

One of the principal questions in the case was whether on December 2, 1920, when the promissory notes were made the plaintiff in error through W. G. Fitzgerald, promised to give the defendants protection against the price decline upon the goods which the defendants had purchased from the plaintiff in error, and whether, later on, it was agreed when the price decline of May 10th, 1921, occurred, that the defendants were given credit for one note. The defendants in error claimed that this agreement was made. Fitzgerald denied that he made the agreement but admitted that he told the defendants to hold up the payment of one note until they got credit upon it; admitted that he considered that they were entitled to credit upon that one note and that he recommended that they should be given

credit for this one note by the factory, which the factory subsequently refused to do. Outside of the question of authority it accordingly became an important question in the case whether when the defendants made the notes they were to be given this price protection and were subsequently given price protection to the amount of one note.

Plaintiff had sold a great amount of tires to the defendants as its distributors for a good portion of the Northwest territory, upon letters and assurances as to the fine quality of the tires. Defendants had accumulated over \$20,000.00 worth of tires due to their inability in large measure to keep the tires sold. There was a gasoline shortage; there was bad weather, and worst of all, the tires proved defective and were returned in quantities by their dealers. Accordingly the defendants were unable to meet their payments when due and insisted that the factory take all the tires back. It is apparent under this situation that if the goods were warranted as of a proper quality and had proven defective that the defendants certainly had a remedy at law and nobody knew this better than the plaintiff in error.

Fitzgerald came to Portland to straighten up the matter with the defendants and it is significant that at the time he came the defendants claimed they had a right to return all the tires to San Francisco to balance their indebtedness. Fitzgerald brought with him to Portland a telegram from the home office at Akron, Ohio, which telegram was offered as defendants' Exhibit

1 (Transcript, page 57). In this telegram it is stated that Fitzgerald should "have all tires returned to San Francisco."

The correspondence which we have heretofore called attention to and which was received without objection showed that the plaintiff was having trouble with its tires throughout the country. It is certainly to be assumed that the plaintiff had a moral obligation to the defendants by reason of the failure of the tires to stand up to their represented quality, and with this situation in mind defendants claim that they made the agreement with Fitzgerald to return something over \$6000.00 worth of tires to San Francisco, and they agreed to retain the balance of the tires and give notes in payment therefor with an agreement that in the event of a price decline they should get the benefit of such reduction upon the stock then retained; and they claim that later on the plaintiff through Fitzgerald agreed to give them credit to the amount of one of the notes. The correspondence in 1920 shows that tires were returned because of defects. We submit that under this situation it was competent to show the *intrinsic probability* of the making of the contract claimed by the defendants and the *reasonableness* of that contract to show not only that portion of the negotiations between the parties leading up to the making of the contract but *all* of the negotiations and the *situation as it actually existed*.

Since early days it has been held competent in the construction of written contracts to show the situation

of the parties. The Supreme Court of the United States in the case of *Nash v. Towne*, 5 Wallace 699, in 1866, stated the rule as follows:

“Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.”

This case has been extensively followed, as may be seen from an examination of 6 Rose's Notes, Revised Edition, page 281. The same rule has been codified in Oregon as Sections 713 and 717 of Oregon Laws. Section 717 of Oregon Laws reads as follows:

“Sec. 717. CONSTRUCTION OF INSTRUMENT. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.”

This rule has been followed by the Supreme Court of Oregon, in the following cases:

Feenaughty v. Beall, 91 Ore. 654, 663.

Salem King's Products Co. v. Ramp, 100 Ore. 329, 356.

Allen v. Hendrick, 104 Ore. 202, 212.

Harvey v. Campbell, 214 Pac. 348, 359.

Stanfield v. Arnwine, 102 Ore. 289, 298, 300.

The same rule is stated with reference to admissibility of evidence of the surrounding facts as to written contracts in Volume 3, Jones Commentaries on Evidence, Section 453, where this standard text writer states that courts in the construction of contracts look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed and in that view they are entitled to place themselves in the same situation as the parties who made the contract so as to view the circumstances as they now view them to judge of the meaning of the words and the correct application to the things desired. This being the well settled rule with reference to the interpretation of *written* contracts, we submit that it is infinitely more applicable with reference to an *unwritten* contract. In reference to the interpretation of an *un-written* contract, as well as to the fact of the existence of the contract itself, it is certainly competent for the Court to examine the subject matter and the surrounding circumstances, and to place itself in the same light which the parties enjoyed when it is claimed the contract was made. The proof of the quality of the tires was one of the surrounding circumstances when this contract was made. The fact is referred to time

and again in the documentary evidence received without objection, and we submit that this situation as it developed between the parties and which was in existence when the agreement was made to return the tires and make promissory notes in December, 1920, was competent evidence to be considered by the Court. As the case developed and additional correspondence was received, it seemed to the attorney for the defendants in error that in spite of prior indications of the Court to the contrary that a sufficient basis had been subsequently established to permit the introduction of this testimony; counsel for defendants in error, in the midst of the trial and uncertain what the verdict would be, felt it as his plain duty to offer testimony which he believed was competent and which would help the defendants in proving that the plaintiff made the agreement which the defendants insist actually was made in this case. The claim that these questions were asked with reference to this matter for the purpose of creating a prejudicial atmosphere is perfectly absurd in the light of the record. The attempt of plaintiff in error to claim that these isolated instances of an effort by the defendants to prove things which they considered material in this case caused a mistrial is without any foundation in fact. The rulings of the Court were in favor of the plaintiff in error and to assert that the asking of a question which the Court did not permit to be answered could have caused this jury to render an unjust verdict is an assertion that the jury did not decide this case on the evidence. The rulings of the Court in

favor of the plaintiff in error were emphatic enough so that the jury certainly could not have decided any issue involved herein upon questions which were not answered.

We repeat, however, that this question is not before this Court under the 4th assignment of error.

We respectfully submit that the judgment of the District Court should be affirmed.

CAKE & CAKE and L. A. LILJEQVIST,
Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE MOHAWK RUBBER COMPANY OF NEW YORK,
INC., a Corporation,

Plaintiff in Error,

vs.

EDGAR J. MUNNELL and ARTHUR J. SHERRILL,
Individually and as Copartners Doing Business
Under the Firm Name and Style of MUNNELL
& SHERRILL,

Defendants in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

S. J. BISCHOFF,
BEACH & SIMON,
Attorneys for Plaintiff in Error.
CAKE & CAKE,
L. A. LILJEQVIST,
Attorneys for Defendants in Error.

FILED
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U. S. DISTRICT COURT
SAN FRANCISCO

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE MOHAWK RUBBER COMPANY OF
NEW YORK, Inc., a Corporation,
Plaintiff in Error,
vs.

EDGAR J. MUNWELL and ARTHUR J. SHER-
RILL, Individually and as Copartners Doing
Business Under the Firm Name and Style
of MUNWELL & SHERRILL,
Defendants in Error.

Reply Brief of Plaintiff in Error.

In point I defendants in error assert that “*agency* and the *authority* of the agent may be proved by the testimony of the agent on the witness stand,” and cite in support thereof Hinton vs. Roethler, 90 Or. 440, and Larkin vs. Carstens, 80 Or. 104. The question of the existence of the agency is not involved in this case. It is admitted that Fitzgerald was plaintiff’s agent. The only question involved is whether the contracts claimed to have been made by him were within the *scope of his authority*. Neither of the cases referred to decide that the agent may testify to the *bare conclusion* that “I have authority” to do thus and so, and hence do not sup-

port the latter part of the assertion. In neither case did the agent testify to the bare statement that he was an agent or that he had authority to make the contract. The alleged agent in each case testified to the *conversations and communications* that passed between himself and the alleged principal and it was held that by this testimony the agency could be established, but nothing was said in either case as to establishing the scope of the agency by his bare conclusion that he had authority, which is the question presented in this case.

The only evidence referred to by defendants as constituting proof of the *scope* of Fitzgerald's authority is at page 111 of their brief and is as follows:

Q. In other words, the things that you did—

A. I was within my authority.

Q. The contracts that you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn't you? A. I did.

This is merely culling a single question and answer from the body of the evidence and standing by itself might be construed as Fitzgerald's *conclusion* as to the scope of his authority. But as was said in *Aetna Indemnity Co. vs. Ladd*, 135 Fed. (9th Cir.) 636, "His statement could not bind the plaintiff in error, nor prejudice his rights," and as was said in *Keane vs. Pittsburg*, 105 Pac. 60 (where the agent was asked "you had full authority to make that agreement"), "it was not what the witness' opinion may have been as to

what his authority was that determined his authority, but such authority must be determined from the facts."

This question and answer cannot, however, be taken alone. It must be read in the light of all his evidence and when that is done, it is very apparent that what he meant by that statement was that he had the authority to make the concessions that he did make, *because he had received express instructions in respect thereto in each instance* in which he made an arrangement that was not a part of his duties of selling merchandise. The evidence establishes beyond question that in each instance he sought express permission to make whatever concession was being requested by defendants in error and in those instances where the requests were granted it was only after express permission had been received from the home office. In every specific instance referred to by defendants it was shown that the concession was made as a result of express permission covering that particular concession.

At pages 109 and 140 of the brief of defendants in error an attempt is made to spell out the authority of Fitzgerald to make the contracts referred to in the answer as *incidental* to the alleged right of Fitzgerald to make *territorial arrangements* with distributors. But no attempt is made to indicate how the right to make territorial arrangements with distributors (which is an incident to the business of the sales manager) can include the right to cancel notes held by the principal, to relieve a

debtor from liability for the purchase price of merchandise, to make agreements for unlimited protection against declines in price, no matter when the merchandise was bought or when the price declined or to bind the principal by an agreement which would result in the return of a large quantity of merchandise after it had been sold and delivered a long time and the customer had become liable therefor. Nor is it possible to conceive how these things can be incidental to the right to make territorial arrangements or what one has to do with the other, especially in view of the fact that defendants in error were distinctly told,

“when it comes to credits, return of unsold merchandise and things of that caliber, you are dealing with our credit department, because after we (meaning Fitzgerald) have made a sale of goods then the matter passes out of our hands to those of the credit department at Akron, and we have no authority to take action on matters pertaining to their department.”
(Exh. KK, Trans., p. 188.)

(Parentheses ours.)

II.

The attack upon the judgment by reason of the misconduct of trial counsel for defendants in error is met by a mighty effort to preclude or prevent a consideration of the phase of the case by challenging the sufficiency of the assignment of errors.

It must be remembered that with respect to the question of misconduct of counsel, we do not claim that the *Court* committed error in respect thereto *during the trial*, for the Court sustained the ob-

jection of the plaintiff in error in each instance in which defendant in error attempted to introduce the same objectionable matter before the jury. There was no error committed by the Court in this respect *during the trial*. It is with the conduct of the counsel for defendants in error *during* the trial that we find fault with and it is this conduct that we ask the Court to review.

After the jury rendered a verdict for defendants we asked the Court to set it aside and to grant a new trial on the ground that the verdict was brought about by this misconduct (among other grounds) and the refusal of the trial court to grant the motion we assign as error. That is the first place that the Court committed error in respect to this subject, if any there be, for theretofore the Court's rulings had been correct. This error was committed *after* the trial and not *during* the trial. Hence the assignment in this respect could not be of error during the trial but had to be for error in the ruling on the motion for a new trial.

A great deal of space is devoted to the proposition that it was necessary for the assignment of errors to call attention to each instance of misconduct and to set out what transpired in each instance. The assignment of error in this respect is:

IV.

The Court erred in denying plaintiff's motion to set aside the verdict and judgment entered thereon and to grant a new trial, which motion was based upon the following grounds:

1. Misconduct of counsel for defendants in bringing to the attention of the jury on numerous occasions prejudicial matter after the Court had repeatedly ruled that such matters were immaterial and not within the issues."

Rule 11 of this court requires "an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged."

. . . when the error alleged is to the *admission or rejection of evidence*, the assignment shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court the assignment shall set out the part referred to *totidem verbis*."

It will be observed that *only in the cases of errors in the admission or rejection of evidence and in the giving or refusal to give an instruction* by the Court that each specific error alleged must be referred to and the testimony or charge as the case may be must be set out. These, of course, have reference to errors alleged to have been committed by the Court during the trial. *There is no requirement that each specific act of misconduct should be set out.* The only thing that is apparently required is that the general character of misconduct should be specifically set forth and this we did when we said that it consisted of bringing to the attention of the jury on numerous occasions prejudicial matter *after* the Court had repeatedly ruled that such matters were immaterial and not within the issues. That was one character of misconduct as distinguished from other acts of misconduct which one could

be guilty of and in so far as the *Court* was concerned, it committed error in this respect in one instance only and that was *when it overruled the motion for a new trial* based upon this ground.

In support of this assignment of error we call attention in our main brief to *eight* specific instances, quoting in full what had transpired and referring in each instance to the place in the record where it can be found. All of the instances deal with the same matter, namely, the attempt to get to the jury the idea that plaintiff in error had sold to defendants in error defective merchandise which caused them great loss, when there was no such defense interposed. No allegation appeared anywhere in the pleadings which would make such evidence admissible directly or collaterally, and the persistence of counsel in that attempt after the Court had *emphatically* informed defendants' counsel that such evidence was not admissible.

It is also urged that the misconduct was not excepted to. It is our understanding that only *rulings* of the Court *are excepted to* if we believe them to be erroneous, but as to conduct of counsel we can do no more than object thereto if we believe it to be improper. Counsel does not make any rulings and therefore require no exceptions. In this case we not only objected strenuously in each instance, but we specifically noted on the record that the attempts to bring the improper matter to the attention of the jury was assigned as misconduct on at least two occasions. (Trans., pp. 271 and 409).

The fact is, however, that on at least two occasions exceptions were noted to this misconduct. (Trans., pp. 38 and 272.)

The requirement for the "full substance" of the evidence spoken of on page 115 of defendants' brief has reference to errors in the admission or rejection of evidence only. (Rule 11.)

On page 119 of defendants' brief it is urged that because a number of letters were received in evidence, some without objection, in which there was something said about the quality of the tires that defendants were justified in attempting to introduce, the objectionable matter referred to even after the repeated rulings of the Court to the contrary. The only issues in the case as it was tried and as presented by the pleadings was whether certain contracts were made and the scope of the agent's authority. There was no issue involving the quality of merchandise. Hence the letters admitted could only have been admitted for the purpose of determining those issues only and could not be considered for any other purpose.

In *Waldron vs. Waldron*, 156 U. S. 361, an action for the alienation of affections, a judgment-roll had been admitted in evidence without objection to prove that plaintiff had been legally divorced but in the argument counsel called attention to the fact that the divorce was obtained on the ground of adultery, which appeared from the judgment-roll, and Mr. Justice White held:

"It is clear that where evidence is admitted for one purpose only, the mere fact

that its admission was not objected to at the time does not authorize the use of it for other purposes for which it was and could not have been legally introduced."

And so here counsel cannot justify his conduct because some casual reference is to be found in some of the correspondence as to the quality of the tires, especially in view of the fact that adjustment had been made for all defects.

Counsel discuss at great length the right to make of proof when evidence is rejected. This rule was not established for the purpose of enabling counsel to bring to the attention of the jury objectionable matter by indirect means, especially after the Court had repeatedly ruled against the admission of such matter and where there is no possible justification for the attempt to introduce it either in the pleadings or in the evidence. It is the *abuse* of *this rule* by defendants' counsel that we complain of. It will not do in this case for counsel to attempt to justify his conduct by the excuse that he was making an offer of proof or arguing the admissibility of evidence, for he was bound to know from the very beginning that the matter referred to did not have the remotest connection with the issues presented by the pleadings. It was not to be introduced for the purpose of attacking the credibility of any witness or to refresh his recollection, or for any other legitimate purpose for which evidence may be offered. But even if we were to assume that counsel did not know that such evidence was inadmissible

when it was first introduced, he certainly knew it after the Court ruled it down at the outset.

At page 130 of defendant's brief, under the title "Evidence Sufficient," considerable space is devoted to the proposition that this Court will not consider the weight of the evidence, and as to the effect of the verdict of the jury, we do not question the rules of law announced in the cases referred to, but they have no bearing upon the question presented by the writ of review in this case. Our contention is that there is *no evidence* to support the verdict, because there is no evidence that Fitzgerald had authority to make the contracts relied on.

It is also urged that the verdict should not be disturbed because plaintiff in error took no exceptions to the instructions of the Court to the jury. Our complaint here is not with reference to the instructions. The fact is that the Court adopted the view of the law as contended for the plaintiff in error, which was to the effect that where one dealing with an agent knows that his authority is limited, a recovery on the contract made with the agent can only be had on proof of express authority. We contend that since the evidence established definitely that defendants knew the limitation of Fitzgerald's authority, that they were required to establish his authority to make the contracts they rely on by proof of *express* authorization. There is no such proof in the record and counsel for defendant in error does not call attention to any, and hence the verdict is not supported by evidence.

At page 136 of defendants' brief an attempt was made to show that there had been a ratification. The claim of ratification is made here for the first time. The pleadings are silent as to ratification. No such contention was made in the court below nor was the case submitted to the jury under any instructions which would permit a recovery for defendants on the theory of ratification. This is merely an attempt by defendants in error to save themselves by grasping at a straw. It is urged that because plaintiff gave defendant credit for some of the merchandise for which defendants were reliable that that constituted ratification of an unauthorized agreement by which defendants would be relieved of liability for merchandise purchased and from notes given in payment therefor.

It is elementary that receiving that which one is entitled to receive does not constitute a ratification of any unauthorized acts. The rule with respect to ratification is very clearly stated in 2 C. J. 495, as follows:

“When Rule Not Applicable.—The above general rule of course has no application where the principal receives no benefit from the agent's act, or where the benefit received is doubtful and trifling; nor does the general rule apply where the principal is entitled to what he has received without assenting to the act of the agent, and he does not otherwise give his approval to such act, or where the benefit received by the principal is merely incidental and arises out of a credit extended by a third person to the agent individually.”

The foregoing text is supported by numerous decisions, among them being the case of *Baldwin Fertilizer Co. vs. Thompson*, 32 S. E. 591, in which it was held that if the principal merely receives back his own property, which was in the custody of another and to which he was unconditionally entitled, he does not thereby ratify any unauthorized agreement made by his agent under which the possession was restored, in the absence of any other evidence of a ratification of such act.

In *Torrence vs. Sheed*, 112 Ill. 466, it was held that where an agent makes an unauthorized contract for a sale of land to a tenant of his principal, the fact that the principal has knowledge of the contract and collects a small sum of money from the tenant, who at the time of the contract was in arrears for rent under his lease, is not a ratification of the contract of sale.

In the case at bar the only act which it is claimed constitutes a ratification was the issuance of a credit by plaintiff to defendants for part of the merchandise theretofore sold. This does not constitute consideration for an agreement by the agent to relieve defendants from liability for the balance of the purchase price, or from liability on the notes taken in part payment.

Toward the close of defendant's brief attempt is made to justify the conduct of counsel in attempting to introduce evidence as to defective conditions of tires and that defendants suffered great loss thereby. From an examination of the argument used it will be at once apparent that this justifica-

tion could only be available if defendant in error had pleaded an agreement for cancellation of indebtedness because of defective condition of tires or had pleaded a defense or counterclaim based on breach of warranty or similar plea. But in the absence of anything in the pleading, making the question as to the condition of the merchandise material, the attempt to inject that matter into the case, after the repeated adverse rulings of the Court, was manifest misconduct.

Respectfully submitted,

S. J. BISCHOFF,

Attorney for Plaintiff in Error.

No. 4122

United States
Circuit Court of Appeals
For the Ninth District

THE MOHAWK RUBBER COMPANY,--
of New York, Inc., a Corporation,
Plaintiff in Error,

vs.

EDGAR J. MUNNELL and
ARTHUR J. SHERRILL,

Individually and as co-partners doing
business under the firm name
and style of Munnell & Sherrill,
Defendants in Error.

MOTION OF RESPONDENTS IN ERROR
FOR REHEARING

BEACH & SIMON, S. J. BISCHOFF,

Attorneys for Plaintiff in Error

W. M. CAKE, RALPH H. CAKE and L. A. LILJEQVIST,

Attorneys for Defendants in Error.

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United States
Circuit Court of Appeals
For the Ninth District

THE MOHAWK RUBBER COMPANY,
of New York, Inc., a Corporation,
Plaintiff in Error,

vs.

EDGAR J. MUNNELL and
ARTHUR J. SHERRILL,
Individually and as co-partners do-
ing business under the firm name
and style of Munnell & Sherrill,
Defendants in Error.

PETITION
FOR
REHEARING

WRIT OF ERROR TO THE UNITED STATES DIS-
TRICT COURT FOR THE DISTRICT OF OREGON

BEACH & SIMON, S. J. BISCHOFF,

Attorneys for Plaintiff in Error

W. M. CAKE, RALPH H. CAKE and L. A. LILJEQVIST,

Attorneys for Defendants in Error.

The defendants in error respectfully petition the court to grant a rehearing in the above entitled case with particular reference to the following features thereof:

- (a) The credit claimed by the defendants of the sum of \$249.44;

(b) The credit claimed by the defendants of the sum of \$9,814.20.

We are left in doubt as to whether or not we fully presented our case in reference to these two matters inasmuch as the opinion is silent as to each of them, and we were firmly of the opinion that our contentions in respect to them were most strongly supported by the evidence, not only on behalf of the defendants, but by the evidence for the plaintiff.

First, as to the \$249.44. The letter of Mohawk Rubber Company (Exhibit 45, Transcript page 368) announces that claims for rebates for tires purchased since September 15, 1921, and on hand unsold November 15, 1921, will be recognized upon the serial sizes and complete information sent in. The defendants by letter of November 21, 1921, (Exhibit 43) enclose a list in accordance with the letter from Mohawk Rubber Company. No objection to this list was made. Based upon the list enclosed by the defendants, the plaintiff credited the defendants with \$111.68. The basis of calculation is the difference between the old price on May 10, 1921, as shown by the price list, Defendants' Exhibit 3, and the new price on November 15, 1921, as shown by the price list, Defendants' Exhibit 45. It becomes simply a question of mathematical computation which is made in our brief on page 62 thereof. No word appears in the evidence attempting on the part of plaintiff's witnesses to make any explanation of this difference, which amounts to \$137.76.

Second, the credit claimed by Respondents of \$9,814.20 will now be considered.

Very respectfully, but because of its great importance to the defendants, we presume to briefly call the Court's attention to certain portions of the evidence bearing on this question.

For the purpose of identification, we will call the transaction which Mr. Fitzgerald conducted in which the notes were given, "the note transaction," and that involving the claim of credit of \$9,814.20 "the Cassidy deal." The first occurred December 2, 1920, and the second September 18, 1921, and in so far as the reasons and cause of the claim for credit in the Cassidy deal are concerned there is clearly no connection between the two.

We are forced to infer from the opinion that the lack of authority in Mr. Fitzgerald in the "note transaction" proved the lack of authority on the part of Fitzgerald in the "Cassidy deal," but we submit that the evidence of authority lacking in the note transaction was supplied in the Cassidy deal, and such additional confirmation of authority by the plaintiff appears in that deal, that we are at a loss to doubt Fitzgerald's authority in the latter deal, and therefore are compelled to request a rehearing.

The portion of our brief covering this point is shown on pages 65 to 112.

It appears undisputed that plaintiff requested defendants to give up the agency of Mohawk tires to American Tire &

Rubber Company, of which Mr. Cassidy was the proprietor, the negotiations leading up thereto appearing in the testimony of Fitzgerald, plaintiff's agent and witness. (Trans. pp. 482-491 inclusive.)

Fitzgerald had authority with respect to territorial arrangements, etc. (Plaintiff's Exhibit KK, trans. p. 188.) His arrangements for the transfer of the agency to Cassidy have never been questioned. To the extent, then, of completing the transfer of the agency and incidental matters in relation thereto, his authority has been accepted as complete. Necessarily, Cassidy had to have some stock, and, necessarily, the source from which the stock would be secured and the disposition of defendants' stock would be pertinent to the negotiations and settlement of the transfer, hence on page 490 of the Transcript there appears the following question propounded to Fitzgerald by plaintiff's attorney, and Fitzgerald's answer:

"Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy *if he would accept the whole or any part of the merchandise?*

"A. Correct."

Let us consider for a moment that the letter of November, 1920, (Transcript p. 188) advised the defendants of the limits of Fitzgerald's authority, and that he would have to have further authority to actually agree to the transfer of the account to the extent of \$9,814.20 from the defendants to Cassidy. Was there such additional authority, and does that appear in the evidence in this case?

This stock of tires was taken over by Cassidy sending his truck to the defendants and transferring them to his own stock. This act of Cassidy was pursuant to the letter of Fitzgerald of the 18th of September, 1921, wherein he states:

“ . . . Any Mohawk tires or tubes that you have in stock at present, and *in any quantity or sizes that may be agreeable to yourselves and the said George H. Cassidy.*”

Fitzgerald then on cross examination responds as follows:

“Q. In other words, the things that you did

“A. I was within my authority.

“Q. The contracts you did make and the deals you did consummate with the people with whom you dealt, you did have authority for those things, didn't you?

“A. I did.”

Fitzgerald did write this letter. He did authorize defendants to deliver to Cassidy “any Mohawk tires or tubes that you have in stock, and in any quantity or sizes that might be agreeable to yourselves and the said George H. Cassidy.”

Fitzgerald's testimony, then, that he did have authority to make any contracts that he made and consummate any deals that he did consummate, we respectfully submit, is a

statement that he did have authority to order these tires to be transferred from defendants to Cassidy, because he did order these tires to be transferred by defendants to Cassidy.

Fitzgerald's opinion of his authority might not be sufficient in the minds of the court to bind his principal, but that he did the things stated and that he did testify that he had such authority is proven by the letter and his testimony, and so far as the value of his testimony is concerned, he has established his authority to write the letter of September 18, 1921.

That his action came within his authority is borne out by the expressed judgment of the plaintiff's attorney when he asks, (Trans. p. 490.)

"Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy, *if he would accept the whole or any part of the merchandise?*

"A. Correct."

In other words, the fact established that Fitzgerald wrote the letter of September 8th, his testimony that he had authority to do anything that he did do, nothing remains but the construction of the letter. If, however, the opinion of the court indicates that more than Fitzgerald's testimony would be required to show authority, it is in the evidence and from the pen of the plaintiff.

The remarkable thing in determining Fitzgerald's authority, and which, in view of the opinion of the court, com-

pels the conclusion that we did not bring out clearly his full authority, is the letter of Mr. Mason over the name of Mohawk Rubber Company to the defendants, dated November 14, 1921 (Plaintiff's Exhibit GGG, trans. pp. 273-4) wherein Mr. Mason writes:

"The permission which you were given to deliver tires to the American Tire and Rubber Company says *very distinctly* that the tires were to be delivered in *any quantity* or sizes that might be agreeable to yourselves and Mr. Cassidy. It is our understanding that he did *not* request *nor* agree to the return of this lot of tires in question."

Mr. Mason is the man who, in his deposition, states that he is the sole depositary of authority of the Mohawk Rubber Company, plaintiff in this case, and he states, in effect, that it is his understanding that Mr. Fitzgerald had given his permission to the defendants to deliver to Cassidy the tires in any quantity or sizes that might be agreeable to Cassidy and the defendants, and that very distinctly appears. Is this a confirmation of the authority of Fitzgerald to write that letter of September 18, 1921, or is it a ratification, because, we respectfully submit, it must be one of the two? In either case, an endorsement of Mr. Fitzgerald's action in writing this letter. In other words, Mr. Mason on November 14, 1921, had the same understanding of the permission given by Mr. Fitzgerald's letter of September 18th that the defendants had and that Mr. Cassidy had, but he did not know that Cassidy had requested and did agree to the return of the tires in question.

If Mr. Mason, on November 14th, did read this letter of Fitzgerald's and construe it as he did in his letter of that date, how can the defendants be held liable for construing it as he did and delivering the tires to Cassidy?

To put into Fitzgerald's letter of September 18th the provision that Fitzgerald only gave permission to the defendants to deliver such tires as Cassidy could "use" and "retain" (as contained in telegram of October 12th, 1921, Trans. p. 257) is to put into the letter something that is not there, and we have searched the record in vain to find any conversation relating or hinted that would justify the insertion of such a thought in that letter.

It is true Mr. Mason in his letter says, "It was clearly understood that this (permission to deliver tires to Cassidy) was merely permission for him (Cassidy) to draw upon your stock for such goods as he might need," but this is only Mr. Mason's statement of the transaction necessarily hearsay; no evidence of such understanding appears anywhere in the record, and if such had been understood, from the very nature of the case, it would have been with Cassidy and not defendants, or at least Cassidy would have been responsible to plaintiff and not defendants.

So, in view of the foregoing, Judge Bean instructed the jury, and likewise said in effect in denying the motion for new trial, as follows:

"Now, the contract is evidenced by the writing—the Fitzgerald letter of September 18, 1921. Under the contract the defendants are entitled to a

credit for such tires as they delivered to Cassidy *and which were agreeable to him* and are entitled only to credit for such tires as were delivered and agreeable to Mr. Cassidy. It is therefore incumbent upon the defendants to establish what quantity of merchandise was delivered to Cassidy and agreeable to him, and it is immaterial how much they sent over, and it is also immaterial what disposition Cassidy made of the tires as far as the plaintiff is concerned. *The only question for you to determine is, if the contract was made how much of the merchandise delivered by the defendants to Cassidy was agreeable to him.*" (Trans. p. 529.)

It seems clear to us that plaintiff is forced to claim that it had nothing to do with the tires in question, not because Mr. Fitzgerald had no authority to write the letter and authorize their delivery to Mr. Cassidy, but that Cassidy had not agreed to the return or requested the return of the tires as requested by Mr. Fitzgerald's letter, but that in so far as any authority on the part of Fitzgerald to write it is concerned, it is in clear-cut English language admitted or confirmed and ratified.

In addition to the foregoing, we respectfully attract the court's attention to the following:

On September 21, 1921, the defendants wrote to plaintiff a letter containing the following paragraph:

"On instructions from Mr. Fitzgerald we have transferred all of our stock of Mohawk tires to the American Tire and Rubber Company. We are send-

ing the numbers to San Francisco asking that they credit our account for same." (Trans. p. 314.)

In response thereto, and without objection to the "instructions from Mr. Fitzgerald," the plaintiff wrote on September 26, 1921, as follows:

"This will acknowledge your letter of September 21, and we note that you have transferred the greater portion of this stock to the American Tire and Rubber Company *in accordance with instructions from Mr. Fitzgerald.*

"With reference to the keeping of the line for local sale, the writer has not received as yet full information from Mr. Fitzgerald regarding these changes. He had a letter last Saturday that covered a considerable portion of the proposition, and in this he mentioned that he thought that arrangements could be made to have you continue the line; and so far as we are concerned, we shall be mighty glad to have you do it. However, whether or not it can be satisfactorily arranged *depends to a considerable extent upon the third party to the proposition*; but from what Mr. Fitzgerald wrote, they were favorable to having you continue the line in a local way, and we really hope that it may be fixed up in that manner.

"Naturally, you will understand that at this distance from your city and with more or less incomplete information and with a third party to whom we cannot talk, to be considered, *the whole matter is something that will have to be handled by Mr. Fitzgerald.*" (Trans. pp. 315-317.)

From the foregoing letters, namely, September 26, 1921, acknowledging transfer of the stock pursuant to instructions from Mr. Fitzgerald, without objection, referring to the inability to determine the proper course at the distance and in view of the existence of a third party in the transaction with whom they could not talk, that the whole matter should be handled by Fitzgerald, and the letter of November 14, 1921, where the permission to deliver tires to Cassidy is expressed by Mr. Mason, the President and sole depositary of authority of plaintiff, says "very distinctly" that the tires were to be delivered in any quantity or sizes that might be agreeable to the defendants and Cassidy, but he understood that Cassidy did not request or agree to the return of this lot of tires, we submit that the authority of the Mohawk Rubber Company is so clearly given and expressed, that the only remaining question in substance is, was the lot of tires agreeable to himself and the defendants?

We respectfully refer to the testimony of Fitzgerald as follows:

"Q. What I am asking you is this: It was within the scope of your authority, as a matter of fact, was it not, to have had Munnell & Sherrill, in consideration of cleaning up their business and turning it over to a new distributor, to turn their entire stock over to Cassidy?

"A. *Provided Cassidy would have accepted it.*

"Q. I say that is within the scope of your authority?

"A. I say provided Cassidy had accepted it.
(Trans. pp. 509-510.)

"Q. As a matter of fact, you had an agreement with Cassidy, didn't you, that he should take over these tires, and what he didn't sell or dispose of he should ship back to San Francisco, and you would give him an extra discount?"

"A. I did.

(Trans. p. 510.)

On direct examination for plaintiff in error Cassidy testified:

"That any goods that Munnell & Sherrill shipped over to the American Tire & Rubber, I was to accept, that was my understanding; and whatever I sold out of there the Mohawk Company was to bill me for, and whatever was left when the carload of new stuff arrived I had the privilege of shipping to 'Frisco, which I done."

(Trans. p. 452.)

On cross examination Cassidy was asked:

"Q. And you were to sell what you could and what you couldn't sell you were to return to 'Frisco and they would give you credit?"

"A. Just about word for word what Mr. Fitzgerald told me. If it hadn't been that way I wouldn't have accepted them . . . wouldn't have accepted the tires.

"Q. The tires were accepted by you, weren't they?

"A. Yes, sir.

"Q. . . . The amount you got was accepted by you, wasn't it?

"A. Yes, sir."

(Trans. p. 455.)

Cassidy accepted the tires, then. No further proof of this part of the case need be given.

Growing out of the foregoing, we earnestly call attention to the following:

In view of Mr. Fitzgerald's negotiations with Cassidy and the defendants, his letter of September 18, 1921, his taking the stock sizes and necessarily inspecting the stock with the defendants, and in view of Mr. Cassidy's testimony and Mr. Sherrill's testimony, as heretofore set out, indicating their state of mind as to the quantity and sizes that defendants might deliver to Cassidy and Cassidy should take, we earnestly ask if, when Cassidy's truck drove up to the house of Munnell & Sherrill, the defendants were not justified in placing on the truck and delivering to Cassidy at Cassidy's store, the tires in question, and that the receipt of those tires by Cassidy, without objection, relieved the defendants from further consideration of their actual disposition.

The first intimation that authority of Fitzgerald was

denied comes in a telegram October 9, 1921, two weeks after Mr. Mason's letter of the 26th:

"Steamship Company just notified us large shipment tires received from Portland, our shipping clerk investigated and finds same to be your old stock improperly packed, damaged, dirty and unsalable at regular prices, and we do not propose that it is going to be thrown back on our hands, as you only had the authority of turning over to Cassidy the stock he could use and retain. The shipment is being held at local depot subject to your risk and demurrage charges plus freight. *We might use same at sixty per cent but nothing less.* Wire your disposition.

(Signed) MOHAWK RUBBER COMPANY."

It is a significant fact that this telegram is written from San Francisco and that is where Fitzgerald's headquarters were. Fitzgerald signs the name "Mohawk Rubber Company," and the letter of Mr. Mason of November 14th is in effect as to his, Mr. Mason's view of Mr. Fitzgerald's authority, but Fitzgerald interpolates into his own letter something that cannot be found there in words, that the defendants were only authorized to turn over the stock that Cassidy could use and retain, but it is Fitzgerald denying his own authority.

Assuming, for the sake of argument, that Fitzgerald had the authority to write the letter, if there can be interpolated into this letter the meaning attempted to be put into it by Fitzgerald in his telegram of October 12th from San Francisco, we will have nothing further to say in the case.

So defendant's tires of the agree value of \$9,814.20

were found in San Francisco, improperly packed, damaged, dirty and unsalable at regular prices, and there they have remained, so far as we know, for two years and a half.

This is the first intimation of dissent from the deal and transaction inaugurated, promoted and carried out by Fitzgerald, and Munnell & Sherrill *have never been put into possession of the tires*, and so far as they are concerned, they are a total loss.

The tires were not improperly packed, damaged or dirty and in an unsalable condition at regular prices by any act of the defendants. Fitzgerald, with Cassidy and Sherrill, inventoried this stock, the inventory in the record being in the handwriting of Fitzgerald, and it would seem that the stock was considered sufficiently cleanly, undamaged and in such salable condition that it could be properly transferred to Cassidy for sale, and if it was improperly packed, or damaged, or dirty, it must have been so rendered after it left the storerooms of the defendants, with the result that, at least unwittingly but in good faith if the court adheres to its original opinion, the defendants, relying on Fitzgerald, have absolutely lost the tires in question.

It does seem to us that there is an imperative need for correction of the apparent failure to present this question in such light that the court would be sufficiently and completely advised and can plainly see the plight in which the defendants are left.

We most respectfully call attention to the opinion of Judge Bean on the motion for a new trial upon this point and appearing at page 539 of the Transcript.

“There can be no reasonable question on the record but what Fitzgerald had authority to make the agreement of September, 1921, transferring the business from the defendants to Cassidy, *and under that contract defendants were authorized to turn over to Cassidy any tires or tubes that they had in stock and in any quantity or sizes that might be agreeable to themselves and Cassidy, and for such quantity as was thus turned over they were entitled to credit on their account.* The only question, therefore, on that branch of the case was the quantity and value of the tires delivered to Cassidy in pursuance to such contract.”

It may be that Mr. Mason's letter of November, 1921, is a ratification or confirmation of Fitzgerald's authority; in either case we have in our original brief set forth the law applicable, and so need not repeat it here, but this letter, we submit, positively and unequivocally shows the report of Fitzgerald to the home office as to what he had done, with the resultant acceptance thereof on the part of the home office, and its refuge for refusing the credit to Munnell & Sherrill for the tires so delivered, in the belief that Cassidy “*did not request nor agree*” to the return of the tires in question.

Because of the foregoing, we respectfully request the court that a rehearing be granted the defendants with particular reference to the matters set forth in this motion.

W. M. CAKE,
RALPH H. CAKE,
L. A. LILJEQVIST,
Attorneys for Respondents.

United States
Circuit Court of Appeals ⁶

For the Ninth Circuit

**THE MOHAWK RUBBER COMPANY OF
NEW YORK, INC., a corporation,**
Plaintiff in Error,

v.

**EDGAR J. MUNNELL and ARTHUR J.
SHERRILL, individually, and as co-partners
doing business under the firm name and style
of Munnell & Sherrill,**
Defendants in Error.

REPLY TO PETITION FOR REHEARING

**BEACH & SIMON,
S. J. BISCHOFF,
Attorneys for Plaintiff in Error.
CAKE & CAKE,
L. A. LILJEQVIST,
Attorneys for Defendants in Error.**

FILED

MAY 2 1924

F. D. MONCKTON

United States
Circuit Court of Appeals
For the Ninth Circuit

THE MOHAWK RUBBER COMPANY OF
NEW YORK, INC., a corporation,
Plaintiff in Error,
v.
EDGAR J. MUNNELL and ARTHUR J.
SHERRILL, individually, and as co-partners
doing business under the firm name and style
of Munnell & Sherrill,
Defendants in Error.

REPLY TO PETITION FOR REHEARING

The petition for rehearing is not supported by a certificate of counsel that the petition is well founded and that it is not interposed for delay, as required by rule 29 of this Court.

Every matter referred to in the petition has been heretofore fully presented by defendants in

error in a voluminous brief and in oral argument, and from the opinion rendered it is apparent that every proposition advanced in the present petition has received the attention and consideration of the Court.

It is again urged that Fitzgerald's authority to make an agreement that would result in the return of merchandise and release defendants from liability for the purchase price, was established, because Fitzgerald had himself testified to the bare conclusion that he had authority to do the things he did do. (Petition, page 7.) This was the very point made upon the hearing and was the only evidence defendants relied on to support the judgment. (Defendants' Brief, pages 110 and 111.) The contention received the attention and the consideration of the Court, for in its opinion the Court says:

"It is correct that on cross-examination Fitzgerald testified for contracts that he did make, he had authority. But when that statement is considered with other portions of his evidence, it is clear that he referred to an agreement which he admitted having made. He explained that for the \$6500.00 credit transaction and the November, 1920, agreement to take back the tires he had special authority which was necessary, but stated that without such authority his agency was limited merely to the selling end. His testimony was positively ^{what except} ~~not~~ accepted in the matter just referred to,

He had no authority to make and that he did not tell defendant that he could ~~not~~ make any agreement for rebate or cancellation of notes or return of tires."

The petition is misleading because it is made up by culling a phrase here and there from the letters and testimony, and the argument is based upon these isolated phrases.

For example, on page 6 of the petition counsel quote a single question and answer, which is as follows:

"Q. The entire transaction consummated was just a matter of shifting the territory from Munnell & Sherrill to Cassidy if he would accept the whole or any part of the merchandise?

A. Correct."

But omit the next two questions and answers, which are as follows (pages 490-491):

"Q. It wasn't contemplated that the Mohawk Company would take back any of that merchandise?

A. No, that merchandise was of no benefit to us; no use to us.

Q. Had you been authorized by Mohawk Company to make any arrangement which would result in these tires coming back to them?

A. I had not."

It is apparent, when this testimony is read together, that while Fitzgerald was arranging to change the representation in this territory from Munnell & Sherrill to Cassidy, he was not making any agreement and had no authority to make any agreement which would result in the return of Munnell & Sherrill's stock of tires to the Mohawk Company and to release them from liability for the purchase price thereof.

The same criticism is applicable to the quotation of the isolated questions and answers on page 7 of the petition, for that testimony has reference to those contracts which he admitted having made and not to those contracts which he denied having made. Fitzgerald was emphatic in his denial that he made any agreement that would result in the return of Munnell & Sherrill's stock of tires or that he had agreed to release them from liability. The quotations on page 7 of the petition have reference to those contracts which he made upon **express instructions** from his principal.

On page 9 counsel again quotes an excerpt from a letter which cannot be construed by itself. The fore part of the same letter, which is not quoted, says: (page 273.)

"Inasmuch as the tires were originally shipped to you and have never been charged to anyone else, it is natural and logical that they be considered your property, regardless of the

course which they took after leaving your hands."

This is a denial of authority to make an agreement that would result in the return of Munnell & Sherrill's stock of tires and to release them from liability, and not a confirmation of authority, as counsel argues from the excerpt that he quotes.

On page 12 of the petition is another misleading excerpt. Counsel quotes from plaintiff's letter of September 26, 1921, in which plaintiff says:

"This will acknowledge your letter of Sept. 21st and we note that you have transferred the greater portion of this stock to the American Tire & Rubber Company and in accordance with instructions from Mr. Fitzgerald."

The Court will observe that the phrase "in accordance with instructions from Mr. Fitzgerald" is printed in italics; is treated as though uttered by plaintiff, and on the following page counsel argues that this is an acknowledgment that the transfer was made in accordance with instructions. The fact is, however, that on September 21 **defendants** wrote plaintiff (Petition, page 11):

"On instructions from Mr. Fitzgerald we have transferred all of our stock of Mohawk tires to the American Tire & Rubber Company."

In acknowledging receipt of this letter plaintiff said:

"This will acknowledge your letter of Sept. 21st and **we note** that you have transferred the greater portion of this stock to the American Tire & Rubber Co. in accordance with instruction from Mr. Fitzgerald . . ."

Plaintiff was merely quoting defendants' statement in their letter, but counsel by italicizing and by his argument on page 13 attempts to put the phrase "in accordance with instructions from Mr. Fitzgerald . . ." into the mouth of the plaintiff, and bases thereon the assertion that this phrase is a confirmation of the authority of Fitzgerald to bind plaintiff by agreements for the return of merchandise and agreements releasing defendants from the liability for the purchase price of the merchandise. This is a manifest attempt at juggling words and not an attempt to aid the Court in construing the letters.

The question involved, however, is not whether Fitzgerald gave the permission. The important point, the one that was involved and decided, is whether he had authority to give any permission which would result in a contract for the return of merchandise and release from liability for the purchase price, and there is not a word in the letter referred to which creates or confirms such authority.

In the same two letters, to-wit, September 21st and 26th, the defendants suggest that arrange-

ments could be made to permit them to handle the line in conjunction with Cassidy. In replying to this suggestion plaintiff said that it would be glad to have them do so, provided it was agreeable to Cassidy, but added "that the whole matter is something that would have to be handled by Mr. Fitzgerald." This, of course, referred to the matter of selling tires to Munnell & Sherrill after the arrangement with Cassidy, and had to do with the "selling end" of the business. Counsel, however, attempts to urge upon this Court that the statement:

"The whole matter is something that will have to be handled by Mr. Fitzgerald"

is a confirmation of authority to consent to the return of old stock of tires and to release defendants from liability.

Counsel again urges that because Fitzgerald said that he had authority to make the agreements that he did make that this constituted evidence as to the scope of his authority. The same argument was made before and was disposed of by this Court in the decision heretofore rendered.

Counsel say that they are forced to infer from the opinion that the lack of authority in Mr. Fitzgerald in the note transaction proved the lack of authority on the part of Fitzgerald in the Cassidy deal. The opinion heretofore rendered indicates that the Court considered the entire record and held:

“We regard the written communications put in evidence, when considered with the oral testimony, as conclusively showing that except by special authorization the authority of Fitzgerald was limited and that he had no power to **permit a return of merchandise or to relieve defendants of liability for the purchase price of merchandise sold** and delivered by plaintiff to defendants, and that such limitation of Fitzgerald’s authority was thoroughly well known to defendants.”

This part of the opinion deals with the matter of returning merchandise and releasing purchaser from liability for the purchase price and is dealt with **apart from the question of the right to give rebates or cancel notes**, and counsel’s inference is undoubtedly due to lack of appreciation of the opinion rendered.

On page 6 of the petition defendants again urge as they did in their briefs and upon the hearing that because Fitzgerald had authority to make territorial arrangements with his customers, the authority to cancel debts, relieve from liability and agree to the return of merchandise was incident thereto. This contention was fully presented by the briefs and argued at length and therefore presents nothing that has not already received the attention of the Court. Counsel did not support this proposition by authority before and it does not now and from the bare statement of the proposition it is

apparent that authority to release from an indebtedness or to agree to the return of merchandise can not possibly be incident to the right to make territorial arrangements with customers, especially in view of the fact that the defendants had absolute knowledge of the limitation of Fitzgerald's authority. (Exh. KK, Tr. p. 188.)

Every exhibit and every excerpt referred to in the petition was referred to and fully discussed in defendants' brief, and every argument advanced in the petition was made in the brief and in the oral argument. They have all received the attention and consideration of the Court and we are unable to perceive from the petition any reason for a further hearing.

Respectfully submitted,
BEACH & SIMON, and
S. J. BISCHOFF,
Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation, Bankrupt.
UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner and Appellant,
vs.
C. W. RYAN, as Trustee in Bankruptcy of the Es-
tate of PUGET SOUND ENGINEERING
COMPANY, a Corporation,
Respondent and Appellee.

APPEAL FROM AND
Petition for Revision

Under Section 24b of the Bankruptcy Act of Con-
gress, Approved July 1, 1898, to Revise, in
Matter of Law, of an Order of the
United States District Court for
the Western District of
Washington, North-
ern Division.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation, Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Petitioner,

vs.

C. W. RYAN, as Trustee in Bankruptcy of the Es-
tate of PUGET SOUND ENGINEERING
COMPANY, a Corporation,

Respondent.

Petition for Revision

**Under Section 24b of the Bankruptcy Act of Con-
gress, Approved July 1, 1898, to Revise, in
Matter of Law, an Order of the
United States District Court for
the Western District of
Washington, North-
ern Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Petitioner,

vs.

C. W. RYAN, as Trustee in Bankruptcy of the Es-
tate of Puget Sound Engineering Company,
a Corporation,

Respondent.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,

Bankrupt.

**Petition of United States Fidelity & Guaranty
Company for Review.**

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Your petitioner, the United States Fidelity &
Guaranty Company, a corporation, hereby repre-
sents as follows:

I.

That on or about July 21, 1919, the Puget Sound
Engineering Company, a corporation, the above
bankrupt, made a contract with the State of Wash-
ington for grading, draining and paving with con-
crete a portion of the Pacific Highway between
Salmon Creek and Pioneer (permanent highway
No. 2-B), in Clarke County, in the State of Wash-

2 *United States Fidelity & Guaranty Company*

ington, in which contract, among other things, said bankrupt agreed to furnish the material and do and cause to be done said work in accordance with the drawings and specifications attached to said contract and in accordance with the schedule of unit or itemized prices attached thereto, the estimated cost of said improvement being approximately \$205,485.31; that in and by said contract the bankrupt agreed with the State of Washington to execute and furnish to said state a good and sufficient bond with an approved surety company as surety, in the penal sum of the full amount of the contract, said bond to be payable to the State of Washington.

II.

That thereupon the bankrupt applied to petitioner for said bond and thereupon, and on July 21, 1919, the bankrupt as principal, and petitioner as surety, made and entered into their joint and several bond in writing in favor of said State of Washington, in the penal sum of \$205,485.31, the condition of said bond being that if the bankrupt should faithfully and truly observe and comply with the terms, conditions and provisions of said contract in all respects, and well and truly and faithfully do and perform all matters and things by the bankrupt undertaken to be performed under said contract, upon the terms therein proposed and within the time therein prescribed, and should fully indemnify the State of Washington against any direct or indirect damages that might be suffered or claimed for injuries to persons or property during the construction and improvement of such highway, and until the same

should be accepted, and should pay all laborers, mechanics, subcontractors and materialmen and all persons who should supply such contractors or subcontractors with the provisions and supplies for carrying on such work, and should in all respects faithfully perform said contract according to law, then said obligation, to wit, said bond, should be void, otherwise to remain in full force and effect.

III.

That upon the execution of said contract, and execution and delivery of said bond, the bankrupt entered upon the performance of said contract and continued therein until, to wit, September 20, 1920; that on said last date said bankrupt defaulted in the performance of said contract and abandoned and refused to carry out said work, and thereupon served notification to that effect upon the State Highway Commissioner.

IV.

That thereupon the State Highway Board of the State of Washington, acting for and in behalf of the State of Washington, terminated the employment of the contractor for the completion of said work and in writing notified said United States Fidelity & Guaranty Company to take over and complete said contract in accordance with the terms thereof.

V.

That in and by said contract it was, amongst other things, stipulated and agreed that said bankrupt should complete all the work called for under said contract before the 1st day of July, 1920; that time was the essence of the said contract on the part of

4 *United States Fidelity & Guaranty Company*

the contractor and that in case the contractor should fail in the due performance of the contract by and at the time mentioned or by or at such other time to which the period of completion might have been extended, said bankrupt should be liable to pay to the State of Washington, as and for liquidated damages and not as a penalty, the cost of engineering and inspection, not to exceed the sum of \$25.00 for each and every day which might elapse between the appointed and the actual time of completion.

VI.

That on and between the 20th day of September, 1920, and the 25th day of September, 1920, said United States Fidelity & Guaranty Company was compelled to and did advance and pay out for claims due to laborers for work performed, and to materialmen for materials and supplies furnished said bankrupt in the performance of said work, the sum of \$17,945.61, the said United States Fidelity & Guaranty Company taking assignments of said claims to D. H. McCollister as its agent.

VII.

That on September 25, 1920, at the same time the said United States Fidelity & Guaranty Company paid most of the claims for labor and material above mentioned, the bankrupt did make, execute, acknowledge and deliver unto the said United States Fidelity & Guaranty Company a certain bill of sale wherein and whereby said bankrupt did sell, assign, transfer and set over unto the United States Fidelity & Guaranty Company all the personal property consisting of machinery, tools, equipment,

materials, and supplies of every kind and nature whatsoever, owned and possessed by the bankrupt and located upon said work, for the purpose of enabling said United States Fidelity & Guaranty Company to perform the said contract with the State of Washington for the construction of said highway, which said bill of sale was immediately thereafter recorded and is now of record in Book "E" Record of Bills of Sale, on page 401 of the records in the Auditor's office of Clarke County, Washington, and immediately upon the execution and delivery to it of said bill of sale the said United States Fidelity & Guaranty Company entered upon and took possession of all the work under said contract and undertook to complete said contract, the value of the material and supplies so turned over to the United States Fidelity & Guaranty Company by the bankrupt under said bill of sale being the sum of \$12,000.00, and the value of the equipment so turned over to the United States Fidelity & Guaranty Company by the bankrupt being \$10,000.00.

VIII.

That said contract was fully completed by the United States Fidelity & Guaranty Company and was accepted by the State of Washington on February 1, 1921.

IX.

That on September 20, 1920, at the time when said bankrupt abandoned said contract, there was withheld by the State of Washington as reserve percentages under the contract the sum of \$29,350.30; that within thirty days after the completion

6 *United States Fidelity & Guaranty Company*

of said contract by the United States Fidelity & Guaranty Company, various persons claiming to have furnished labor, material and supplies to the bankrupt in the work provided for by said contract filed claims with the State of Washington in sums aggregating a total of \$24,864.17.

X.

That the total amount expended by the United States Fidelity & Guaranty Company in the completion of said contract and in the payment of claims for wages, material, provisions and supplies was \$70,997.68; that the United States Fidelity & Guaranty Company received from the State of Washington, as the balance due under said contract, the sum of \$45,579.77, and received the further sum of \$3,369.17 on account of cement sacks returned, making the total loss of the United States Fidelity & Guaranty Company in the completion of said contract the sum of \$22,048.74.

XI.

That in the completion of said contract all of the material and supplies and a large part of the equipment sold, assigned and transferred to the United States Fidelity & Guaranty Company by said bankrupt were entirely used and consumed and that a portion only of the machinery, tools and equipment remained in the possession of said United States Fidelity & Guaranty Company at the time of such completion.

XII.

That thereafter, and on, to wit, the 16th day of December, 1920, the above-named Puget Sound

Engineering Company, a corporation, was adjudicated a bankrupt by the United States District Court for the Western District of Washington, Northern Division, and thereafter, and on the 1st day of February, 1921, C. W. Ryan was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter duly qualified as required by law and the order of appointment and ever since has been and now is such trustee.

XIII.

That thereafter and on, to wit, the 11th day of March, 1921, the said United States Fidelity & Guaranty Company commenced an action in the Superior Court of the State of Washington for Thurston County, wherein said United States Fidelity & Guaranty Company was plaintiff and James Allen as State Highway Commissioner, C. W. Clausen as State Auditor, Clifford L. Babcock as State Treasurer of the State of Washington, C. W. Ryan as Trustee in Bankruptcy of the bankrupt herein, and all of the persons who had filed claims with the State Highway Commissioner against the bankrupt and said bond given by the United States Fidelity & Guaranty Company were made defendants, for the purpose of having fixed and established by said Court the claims of said claimants respectively against the reserve percentages withheld by the State of Washington in the sum of \$29,538.30 and against the bond furnished by the said bankrupt and the United States Fidelity & Guaranty Company, and wherein the said United States Fidelity & Guaranty Company prayed judgment that

8 *United States Fidelity & Guaranty Company*

the said claimants so filing claims be required to appear before the said court and establish their several claims against said reserve percentages and against said bond; that the claim of said United States Fidelity & Guaranty Company for the sums advanced by it for the purpose of paying the claims of laborers, material and supply men be established as against said reserve percentages and that said United States Fidelity & Guaranty Company be adjudged and decreed to have a lien upon said reserve percentages and also a lien prior, paramount and superior to the interests of the trustee in bankruptcy of the bankrupt in, on and against all that portion of the plant, machinery, tools, equipment, material and supplies transferred and assigned to said United States Fidelity & Guaranty Company under the bill of sale above mentioned.

XIV.

That the said C. W. Ryan as trustee in bankruptcy filed his answer and cross-complaint in said above-entitled action wherein and whereby, amongst other things, the said trustee in bankruptcy alleged in substance: That said bankrupt was insolvent on September 25, 1920, at the time it gave to the said United States Fidelity & Guaranty Company the bill of sale conveying to it said material, supplies and equipment above mentioned; that said property was so transferred and delivered to said United States Fidelity & Guaranty Company by said bankrupt for the purpose of securing and indemnifying the United States Fidelity & Guaranty Company against the liability and obligation of its suretyship

upon the bond above mentioned; that the liability and obligation of said United States Fidelity & Guaranty Company as surety upon said bond had already been incurred, and that said transfer was in payment of or in security for the payment of an antecedent obligation, and that the said transfer was made within four months before the filing of the petition in bankruptcy against said bankrupt; that the said United States Fidelity & Guaranty Company knew, or had reasonable cause to believe, that on said September 25, 1920, the said bankrupt was insolvent, and that the making, executing and delivery of said bill of sale and the transfer of said property would, in effect, enable the said United States Fidelity & Guaranty Company to receive a greater percentage of its debt than any other creditor or creditors of the said bankrupt of the same class, and that the said bill of sale and the transfer of said property effected a preference and were void against the trustee in bankruptcy.

XV.

The said United States Fidelity & Guaranty Company, for answer to the cross-complaint of said C. W. Ryan, as trustee in bankruptcy, denied each and every allegation thereof.

XVI.

That thereafter said cause came duly and regularly on for trial before said Superior Court and such proceedings were then had that on, to wit, November 21 1921, the said Superior Court did make and cause to be entered its judgment wherein and

10 *United States Fidelity & Guaranty Company*

whereby it did, amongst other things, adjudge and decree as follows:

That the various claimants for labor, material and supplies there should be paid out of said reserve percentages the sum of \$15,921.91, with interest thereon at the rate of 6% per annum from March 2, 1921, and the taxable costs and disbursements of each of them. [8]

That to the Union National Bank of Seattle there should be paid out of said reserve percentages the sum of \$3,000.00, together with interest thereon at the rate of 7% per annum from February 19, 1921, and its taxable costs and disbursements.

That the remainder of the fund constituting the reserve percentages should be paid to the United States Fidelity & Guaranty Company, and that the amount so received from said fund by the United State Fidelity & Guaranty Company was the sum of \$9,040.57.

XVII.

That deducting the said sum of \$9,040.57 from the loss of \$22,048.74 sustained by the said United States Fidelity & Guaranty Company made a net loss of \$13,008.14 to the said United States Fidelity & Guaranty Company.

XVIII.

That in and by said judgment said Superior Court further adjudged and decreed that the said bill of sale made, executed, acknowledged and delivered by said bankrupt conveying to the United States Fidelity & Guaranty Company the machinery, tools, equipment, materials and supplies, was a chattel

mortgage on said property as security for the balance due and owing to the United States Fidelity & Guaranty Company above mentioned, and ordered and directed that an order of sale issue from said Court, directed to the Sheriff of Clarke County, Washington, ordering, directing and requiring said Sheriff to sell said personal property in the manner provided by law and to apply the proceeds of said sale upon the payment of the balance due the United States Fidelity & Guaranty Company, and that all right, title and interest of C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering Company, was subject and inferior to the rights and claims of the said United States Fidelity & Guaranty Company in said property.

XIX.

That thereafter said C. W. Ryan as trustee in bankruptcy as aforesaid appealed to the Supreme Court of the State of Washington from that portion of said judgment wherein it was by said Court adjudged and decreed that the said bill of sale was a chattel mortgage and that the right, title and interest of the said C. W. Ryan as trustee in bankruptcy was subject and inferior to the rights of the United States Fidelity & Guaranty Company as established by said judgment, and did not appeal from any other part of said judgment.

XX.

That thereafter the matter of said appeal having been duly and regularly submitted to the Supreme Court of the State of Washington, said Supreme Court did make and cause to be filed and entered its

decision and opinion wherein and whereby said Supreme Court reversed the decision of said Superior Court, and that thereafter and on, to wit, the 30th day of July, 1923, pursuant to the mandate of said Supreme Court the Superior Court of the State of Washington did make and enter its certain judgment wherein and whereby judgment was entered in said Court in favor of the said C. W. Ryan as Trustee in Bankruptcy and against the said United States Fidelity & Guaranty Company, for the sum of \$22,000.00 together with costs in said Supreme Court and said Superior Court.

XXI.

The United States Fidelity & Guaranty Company, petitioner herein respectfully submits to the Court that by taking over and assuming the completion of said contract upon the default of the bankrupt it preserved and saved to the estate of said bankrupt the said reserved percentages and obtained the application thereof to the payment of debts incurred by said bankrupt on said work, when otherwise, under the terms, provisions and conditions of said contract with the State of Washington, the State of Washington was entitled to and could have used and appropriated the whole of said reserved percentages for the purpose of completing said contract.

XXII.

And the said United States Fidelity & Guaranty Company, petitioner herein, further represents and shows to the Court that by taking over and assuming the completion of said contract upon the default of said bankrupt, said United States Fidelity &

Guaranty Company saved and protected the estate of said bankrupt from the penalties provided by said contract in behalf of the State of Washington by way of charges and penalties for noncompletion of said contract within the time stipulated in said contract.

XXIII.

That by reason of the premises aforesaid, there is due and owing to the United States Fidelity & Guaranty Company from said bankrupt, and the estate of said bankrupt, the sum of \$13,008.17, the net loss sustained by it as hereinbefore alleged, and in addition thereto the sum of \$22,000.00, the value of the supplies and equipment taken and used by it under the bill of sale as aforesaid, as adjudged and decreed by the Superior Court of the State of Washington, making a total of \$35,008.17; that said United States Fidelity & Guaranty Company has received from the sale of a portion of said equipment mentioned in said bill of sale the sum of \$5,095.00, and has received on account of cement sacks returned by it, being a part of the material and supplies mentioned in said bill of sale, the sum of \$2,975.87, making a total of \$8,070.87, and making its total claim against said bankrupt and the estate of said bankrupt the sum of \$26,937.30.

XXIV.

And said United States Fidelity & Guaranty Company further represents and shows to the Court that the account between it and the said bankrupt was and is a mutual, open and current

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account and that, as provided by the terms and provisions of Section 68 of the Bankruptcy Act, this claimant is entitled to have set off against said liability in favor of the trustee in bankruptcy under the judgment entered by the Superior Court of Thurston County, as above alleged, the whole of its said claim of \$26,937.30.

XXV.

And petitioner further shows that on the 22d day of August, 1923, petitioner made and filed in said bankruptcy cause in the United States District Court for the Western District of Washington, Northern Division, sitting at Seattle, its petition and claim wherein and whereby petitioner prayed that said District Court should adjudge and decree that petitioner is entitled to set off against all liability under said judgment of said Superior Court of Thurston County, Washington, the claim of petitioner in the sum of \$26,937.30, or so much thereof as should be allowed and established by the Court, and for other relief; that thereafter and on August 30, 1923, said District Court entered an order on said petition and the answering affidavit of the trustee in opposition thereto, wherein, among other things, the said District Court ordered that the petition of said United States Fidelity & Guaranty Company to set off its said claim against said judgment be denied and that said claim be considered as a general claim in said bankruptcy proceeding.

All of the foregoing facts will be made to appear

more fully unto your Honors by transcript of the record which will be transmitted to this Court.

In consideration of the error thus apparent your petitioner prays that the order of said District Court entered August 30th, 1923, be reviewed and revised in matter of law as provided in Section 24-B of the Bankruptcy Act of 1898 and amendments thereof and rules and practice in such case provided; and that by order of this Court it be decreed that the said order of the District Court of the United States for the Western District of Washington, Northern Division, be set aside and held for naught, and that this Court grant to the petitioner the relief prayed for in said petition verified August 22, 1923, and that petitioner be given such other relief as shall be proper.

CHADWICK, McMICKEN, RAMSEY &
RUPP and

McCLURE & McCLURE,
Attorneys for Petitioner.

United States of America,
Western District of Washington,—ss.

C. H. Campbell, being first duly sworn, on oath deposes and says: That he is the assistant manager of the United States Fidelity & Guaranty Company, the petitioner above named, and makes this affidavit in behalf of said petitioner for the reason that petitioner is a corporation and he is such general officer; that he has read the foregoing petition, knows the contents thereof, and that said petition is true.

C. H. CAMPBELL.

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Subscribed and sworn to before me this 20th day of October, A. D. 1923.

[Seal] WALTER A. McCLURE,
Notary Public in and for the State of Washington,
Residing at Seattle.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,
Bankrupt.

Notice of Filing of Petition for Review.

To C. W. Ryan, Esquire, Trustee in Bankruptcy of
the Estate of the Puget Sound Engineering
Company, a Corporation, Bankrupt, and to
Messrs. McMaster, Hall & Schaefer and Sidney
Teiser, His Attorneys:

You, and each of you, are hereby notified that on
the 29th day of October, 1923, at the hour of ten
o'clock in the forenoon of said day, we will file in
the office of the clerk of the United States Circuit
Court of Appeals for the Ninth Circuit, in the city
of San Francisco, California, a petition for review
in the above-entitled cause, a copy of which petition
is hereto annexed as a part of this notice; and we

will then ask to have the case docketed and the necessary order made thereon to have such case set down for hearing.

CHADWICK, McMICKEN, RAMSEY &
RUPP, and

McCLURE & McCLURE,
Attorneys for Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Appellant,

vs.

C. W. RYAN, as Trustee in Bankruptcy of PUGET
SOUND ENGINEERING COMPANY, a
Corporation, Bankrupt.

Appellee.

Transcript of Record.

Upon Appeal from the United States District
Court for the Western District of Wash-
ington, Northern Division.

Names and Addresses of Counsel.

Messrs. McCLURE & McCLURE, Attorneys for
Appellant,

1512 Hoge Building, Seattle, Washington.

Messrs. CHADWICK, McMICKEN, RAMSEY &
RUPP, Attorneys for Appellant,

660 Colman Building, Seattle, Washington.

SIDNEY TEISER, Esq., Attorney for Appellee,
740 Morgan Building, Portland, Oregon.

Messrs. McMASTER, HALL & SCHAEFER, At-
torneys for Appellee,

Vancouver National Bank Building, Van-
couver, [1*]

In the United States District Court for the Western
District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,
Bankrupt.

**Claim and Petition of the United States Fidelity
& Guaranty Company.**

To the Honorable JEREMIAH NETERER, Judge
of the Above-entitled Court:

Now comes the United States Fidelity & Guaranty

*Page-number appearing at foot of page of original certified Trans-
script of Record.

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Company, a corporation, and propounds its claim against the above-named bankrupt, and in respect thereto respectfully represents and petitions the Court as follows:

I.

That heretofore and on or about July 21, 1919, the above-named bankrupt entered into a contract with the State of Washington for grading, draining and paving with concrete a portion of the Pacific Highway between Salmon Creek and Pioneer (permanent highway No. 2-B) in Clarke County, Washington, wherein and whereby amongst other things said bankrupt did agree with the State of Washington to furnish the material and do and cause to be done said work in accordance with the drawings and specifications attached to said contract and in accordance with the schedule of unit or itemized prices attached thereto, the estimated cost of said improvement being approximately the sum of \$205,485.31, and that in and by said contract the said bankrupt did agree with the State of Washington to execute and furnish to the State of Washington a good and sufficient bond with an approved surety company as surety, said bond to be payable to the State [2] of Washington and to be in the penal sum of the full amount of the contract.

II.

That thereupon said bankrupt made application to the United States Fidelity & Guaranty Company, claimant and petitioner herein, for the said bond agreed by it to be furnished to the State of Washington, and thereupon and on, to wit, the said 21st

day of July, 1919, said bankrupt as principal and said United States Fidelity & Guaranty Company as surety did make and enter into their joint and several bond in writing in favor of the State of Washington in the penal sum of \$205,485.31, the condition of said bond being that if the said bankrupt should faithfully and truly observe and comply with the terms, conditions and provisions of the said contract in all respects, and well and truly and fully do and perform all matters and things by it undertaken to be performed under said contract, upon the terms proposed therein and within the time prescribed therein, and should fully indemnify the State of Washington against any direct or indirect damages that might be suffered or claimed for injuries to persons or property during the construction and improvement of such highway, and until the same should be accepted, and should pay all laborers, mechanics, subcontractors and materialmen and all persons who should supply such contractors or subcontractors with provisions and supplies for the carrying on of such work, and should in all respects faithfully perform said contract according to law, then the said obligation to wit, said bond should be void, otherwise to remain in full [3] force and effect; that upon the execution of said contract and the execution and delivery of said bond, as above alleged, said bankrupt entered upon the performance of said contract and continued therein until, to wit, September 20, 1920; that on said last named date said bankrupt defaulted in the performance of said contract and abandoned and refused to

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carry out the said work and thereupon served notification to that effect upon the State Highway Commissioner.

III.

That thereupon the State Highway Board of the State of Washington, acting for and in behalf of the State of Washington, terminated the employment of the contractor for the completion of said work and in writing notified said United States Fidelity & Guaranty Company to take over and complete said contract in accordance with the terms thereof.

IV.

That in and by said contract it was, amongst other things, stipulated and agreed that said bankrupt should complete all the work called for under said contract before the 1st day of July, 1920; that time was the essence of the said contract on the part of the contractor and that in case the contractor should fail in the due performance of the contract by and at the time mentioned or by or at such other time to which the period of completion might have been extended, said bankrupt should be liable to pay to the State of Washington, as and for liquidated damages and not as a penalty, the cost of engineering and inspection, not to exceed the sum of \$25.00 for each and every day which might elapse between the appointed and the actual time of completion.

[4]

V.

That on and between the 20th day of September, 1920, and the 25th day of September, 1920, said

United States Fidelity & Guaranty Company was compelled to and did advance and pay out for claims due to laborers for work performed, and to materialmen for materials and supplies furnished said bankrupt in the performance of said work, the sum of \$17,945.61, the said United States Fidelity & Guaranty Company taking assignments of said claims to D. H. McCollister as its agent.

VI.

That on September 25th, 1920, and at the same time the said United States Fidelity & Guaranty Company paid most of the claims for labor and material above mentioned, the bankrupt did make, execute, acknowledge and deliver unto the said United States Fidelity & Guaranty Company a certain bill of sale wherein and whereby said bankrupt did sell, assign, transfer and set over unto the United States Fidelity & Guaranty Company all the personal property consisting of machinery, tools, equipment, materials and supplies of every kind and nature whatsoever, owned and possessed by the bankrupt and located upon said work, for the purpose of enabling said United States Fidelity & Guaranty Company to perform the said contract with the State of Washington for the construction of said highway, which said bill of sale was immediately thereafter recorded and is now of record in Book "E" Record of Bills of Sale, on page 401 of the records in the auditor's office of Clarke County, Washington, and immediately upon the execution and delivery to it of said bill of sale the said United States Fidelity & Guaranty Company entered upon and took posses-

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sion of all the work under said contract and undertook [5] to complete said contract, the value of the material and supplies so turned over to the United States Fidelity & Guaranty Company by the Bankrupt under said bill of sale being the sum of \$12,000.00, and the value of the equipment so turned over to the United States Fidelity & Guaranty Company by the bankrupt being \$10,000.00.

VII.

That said contract was fully completed by the United States Fidelity & Guaranty Company and was accepted by the State of Washington on February 1, 1921.

VIII.

That on September 20, 1920, at the time when said bankrupt abandoned said contract, there was withheld by the State of Washington as reserve percentages under the contract the sum of \$29,350.30; that within thirty days after the completion of said contract by the United States Fidelity & Guaranty Company, various persons claiming to have furnished labor, material and supplies to the bankrupt in the work provided for by said contract filed claims with the State of Washington in sums aggregating a total of \$24,864.17.

IX.

That the total amount expended by the United States Fidelity & Guaranty Company in the completion of said contract and in the payment of claims for wages, material, provisions and supplies was \$70,997.68; that the United States Fidelity & Guaranty Company received from the State of

Washington, as the balance due under said contract, the sum of \$45,579.77, and received the further sum of \$3,369.17 on account of cement sacks returned, making the total loss of the United States Fidelity & Guaranty Company in the completion of said contract the sum of \$22,048.74. [6]

X.

That in the completion of said contract all of the material and supplies and a large part of the equipment sold, assigned and transferred to the United States Fidelity & Guaranty Company by said bankrupt were entirely used and consumed and that a portion only of the machinery, tools and equipment remained in the possession of said United States Fidelity & Guaranty Company at the time of such completion.

XI.

That thereafter and on, to wit, the 11th day of March, 1921, the said United States Fidelity & Guaranty Company commenced an action in the Superior Court of the State of Washington for Thurston County, wherein said United States Fidelity & Guaranty Company was plaintiff and James Allen as State Highway Commissioner, C. W. Clausen as State Auditor, Clifford L. Babcock as State Treasurer of the State of Washington, C. W. Ryan as Trustee in Bankruptcy of the bankrupt herein, and all of the persons who had filed claims with the State Highway Commissioner against the bankrupt and said bond given by the United States Fidelity & Guaranty Company were made defendants, for the purpose of having fixed

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and established by said Court the claims of said claimants respectively against the reserve percentages withheld by the State of Washington in the sum of \$29,538.30 and against the bond furnished by the said bankrupt and United States Fidelity & Guaranty Company and wherein the said United States Fidelity & Guaranty Company prayed judgment that the said claimants so filing claims be required to appear before the said court and establish their several claims against said reserve percentages and against said bond; that the claim of said United States Fidelity & Guaranty Company for the sums advanced by it for the purpose of paying the claims of laborers, material and supply men be established as against said reserve percentages and that said United States Fidelity & Guaranty Company be adjudged and decreed to have a lien upon said reserve percentages [7] and also a lien prior, paramount and superior to the interests of the trustee in bankruptcy of the bankrupt in, on and against all that portion of the plant, machinery, tools, equipment, material and supplies transferred and assigned to said United States Fidelity & Guaranty Company under the bill of sale above mentioned.

XII.

That the said C. W. Ryan as trustee in bankruptcy filed his answer and cross-complaint in said above-entitled action wherein and whereby, amongst other things, the said trustee in bankruptcy alleged in substance: That said bankrupt was insolvent on September 25, 1920, at the time it gave to the said United States Fidelity & Guar-

anty Company the bill of sale conveying to it said material, supplies and equipment above mentioned; that said property was so transferred and delivered to said United States Fidelity & Guaranty Company by said bankrupt for the purpose of securing and indemnifying the United States Fidelity & Guaranty Company against the liability and obligation of its suretyship upon the bond above mentioned; that the liability and obligation of said United States Fidelity & Guaranty Company as surety upon said bond had already been incurred, and that said transfer was in payment of or in security for the payment of an antecedent obligation, and that the said transfer was made within four months before the filing of the petition in bankruptcy against said bankrupt; that the said United States Fidelity & Guaranty Company knew, or had reasonable cause to believe, that on said September 25, 1920, the said bankrupt was insolvent, and that the making, executing and delivery of said bill of sale and the transfer of said property would, in effect, enable the said United States Fidelity & Guaranty Company to receive a greater percentage of its debt than any other creditor or creditors of the said bankrupt of the same class, and that the said bill of sale and the transfer of said property effected a preference and were void as against the trustee in bankruptcy. [8]

XIII.

That said United States Fidelity & Guaranty Company, for answer to the cross-complaint of said

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C. W. Ryan, as trustee in bankruptcy, denied each and every allegation thereof.

XIV.

That thereafter said cause came duly and regularly on for trial before said Superior Court and such proceedings were then had that on, to wit, November 21, 1921, the said Superior Court did make and cause to be entered its judgment wherein and whereby it did, amongst other things, adjudge and decree as follows:

That to various claimants for labor, material and supplies there should be paid out of said reserve percentages the sum of \$15,921.91, with interest thereon at the rate of 6% per annum from March 2, 1921, and the taxable costs and disbursements of each of them.

That to the Union National Bank of Seattle there should be paid out of said reserve percentages the sum of \$3,000.00 together with interest thereon at the rate of 7% per annum from February 19, 1921, and its taxable costs and disbursements.

That the remainder of the fund constituting the reserve percentages should be paid to the United States Fidelity & Guaranty Company, and that the amount so received from said fund by the United States Fidelity & Guaranty Company was the sum of \$9,040.57. [9]

XV.

That deducting the said sum of \$9,040.57 from the loss of \$22,048.74 sustained by the said United States Fidelity & Guaranty Company made a net

loss of \$13,008.14 to the said United States Fidelity & Guaranty Company.

XVI.

That in and by said judgment said Superior Court further adjudged and decreed that the said bill of sale made, executed, acknowledged and delivered by said bankrupt conveying to the United States Fidelity & Guaranty Company the machinery, tools, equipment, materials and supplies, was a chattel mortgage on said property as security for the balance due and owing to the United States Fidelity & Guaranty Company above mentioned, and ordered and directed that an order of sale issue from said court, directed to the sheriff of Clarke County, Washington, ordering, directing and requiring said sheriff to sell said personal property in the manner provided by law and to apply the proceeds of said sale upon the payment of the balance due the United States Fidelity & Guaranty Company, and that all right, title and interest of C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering Company, was subject and inferior to the rights and claims of the said United States Fidelity & Guaranty Company in said property. [10]

XVII.

That thereafter said C. W. Ryan as trustee in bankruptcy as aforesaid appealed to the Supreme Court of the State of Washington from that portion of said judgment wherein it was by said Court adjudged and decreed that the said bill of sale was a chattel mortgage and that the right, title and

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interest of the said C. W. Ryan as trustee in bankruptcy was subject and inferior to the rights of the United States Fidelity & Guaranty Company as established by said judgment, and did not appeal from any other part of said judgment.

XVIII.

That thereafter the matter of said appeal having been duly and regularly submitted to the Supreme Court of the State of Washington, said Supreme Court did make and cause to be filed and entered its decision and opinion wherein and whereby said Supreme Court reversed the decision of said Superior Court, a copy of which said opinion is hereto annexed, marked Exhibit "A" and is hereby referred to and hereby made a part hereof, and that thereafter and on to wit, the 30th day of July, 1923, pursuant to the mandate of said Supreme Court, the Superior Court of the State of Washington did make and enter its certain judgment wherein and whereby judgment was entered in said court in favor of the said C. W. Ryan as Trustee in Bankruptcy and against the said United States Fidelity & Guaranty Company, for the sum of \$22,000.00 together with the costs in said Supreme Court and said Superior Court, and that sixty days have not since then elapsed.

XIX.

The United States Fidelity & Guaranty Company, as claimant and petitioner herein, respectfully submits to the Court that by [11] taking over and assuming the completion of said contract upon the default of the bankrupt it preserved and

saved to the estate of said bankrupt the said reserved percentages and obtained the application thereof to the payment of debts incurred by said bankrupt on said work, when otherwise, under the terms, provisions and conditions of said contract with the State of Washington, the State of Washington was entitled to and could have used and appropriated the whole of said reserved percentages for the purpose of completing said contract.

XX.

And the said United States Fidelity & Guaranty Company as claimant and petitioner herein further represents and shows to the Court that by taking over and assuming the completion of said contract upon the default of said bankrupt, said United States Fidelity & Guaranty Company saved and protected the estate of said bankrupt from the penalties provided by said contract in behalf of the State of Washington by way of charges and penalties for noncompletion of said contract within the time stipulated in said contract.

XXI.

That by reason of the premises aforesaid, there is due and owing to the United States Fidelity & Guaranty Company from said bankrupt, and the estate of said bankrupt, the sum of \$13,008.17, the net loss sustained by it as hereinbefore alleged, and in addition thereto the sum of \$22,000.00, the value of the supplies and equipment taken and used by it under the bill of sale as aforesaid, as adjudged and decreed by the Superior Court of the State of Washington, making a total of \$35,008.17; that said

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United States Fidelity & Guaranty Company has received from the sale of a portion of said equipment mentioned in said bill of [12] sale the sum of \$5,095.00, and has received on account of cement sacks returned by it, being a part of the material and supplies mentioned in said bill of sale, the sum of \$2,975.87, making a total of \$8,070.87, and making its total claim against said bankrupt and the estate of said bankrupt the sum of \$26,937.30.

XXII.

And said United States Fidelity & Guaranty Company further represents and shows to the Court that the account between it and the said bankrupt was and is a mutual, open and current account and that, as provided by the terms and provisions of Section 68 of the Bankruptcy Act, this claimant is entitled to have set off against said liability in favor of the Trustee in Bankruptcy under the judgment entered by the Superior Court of Thurston County, as above alleged, the whole of its said claim of \$26,937.30.

XXIII.

And said United States Fidelity & Guaranty Company, as petitioner and claimant as aforesaid, respectfully represents and shows to the Court that the said C. W. Ryan as trustee in bankruptcy as aforesaid, as claimant and petitioner is informed and believes, threatens to, and is about to, cause to be issued from the said Superior Court of Thurston County a writ of execution to enforce payment by the claimant and petitioner of the amount due upon said judgment without granting or allowing

the claimant and petitioner the setoff allowed to it by Section 68 of the Bankruptcy Act, as aforesaid, and in violation of its rights under said act; that by reason of the premises aforesaid an emergency exists and that an order to show cause should be issued by this Court restraining and enjoining the said C. W. Ryan, as trustee in bankruptcy, from issuing execution upon said judgment or taking any steps whatsoever to enforce the collection of said judgment until the rights of the [13] claimant and petitioner to the set off herein claimed shall have been adjudicated and determined by this court.

WHEREFORE said United States Fidelity & Guaranty Company, as claimant and petitioner aforesaid, respectfully prays an order and judgment of this Court as follows:

1. That hearing be had herein after due notice and that at such hearing the Court order, adjudge and decree that the said United States Fidelity & Guaranty Company as claimant and petitioner herein is entitled to set off against all liability under said judgment of said Superior Court of Thurston County its claim in the sum of \$26,937.30 or so much thereof as shall be allowed and established by the Court.

2. That in case for any reason the petition of said United States Fidelity & Guaranty Company to set off its said claim against said judgment shall be overruled or denied by the Court, the claimant and petitioner's claim against said bankrupt es-

tate be allowed in the sum of \$26,937.30 or in such other sum as the Court shall determine.

3. That a time and place be fixed by the Court for the hearing of this petition and that the said C. W. Ryan as trustee in bankruptcy be ordered and required then and there to show cause why the prayer of this petition should not be granted and that in the meantime, and until further order, the trustee be stayed, restrained and enjoined from taking any proceedings whatsoever to enforce collection or payment of said judgment of the Superior Court of the State of Washington for Thurston County by levy, seizure, execution or other process.

4. That the United States Fidelity & Guaranty Company as claimant and petitioner herein have such further order, judgment and decree of the Court as to the Court shall seem meet and proper.

McCLURE & McCLURE,

Attorneys for United States Fidelity & Guaranty Company. [14]

XXIV.

That no part of said debt has been paid except as stated; that there are no setoffs or counterclaims to the same except as stated; that no note or other evidence of said indebtedness has been given by said bankrupt and no note or other evidence of said indebtedness has been received by said petitioner; that no judgment has been recovered for or on account of said claim except as stated; that the petitioner has not nor has any person by its order, or to its knowledge or belief, for its use, had

or received any manner of security for said debt whatever except as stated.

Above amendment to petition allowed by Court August 30, 1923, trustee's counsel consenting thereto.

FRANK S. DIETRICH,
Judge. [15]

State of Washington,
County of King,—ss.

C. H. Campbell, being first duly sworn, on oath deposes and says: That he is assistant manager of the United States Fidelity & Guaranty Company, the claimant and petitioner above named, and makes this affidavit in behalf of said claimant and petitioner for the reason that said claimant and petitioner is a corporation and he is such general officer; that he has read the foregoing petition and claim, and does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

C. H. CAMPBELL.

Subscribed and sworn to before me this 22d day of August, A. D. 1923.

[Notarial Seal] WALTER A. McCLURE,
Notary Public in and for the State of Washington,
Residing at Seattle. [16]

Opinion.

PARKER, J.—This equity suit was commenced in the Superior Court for Thurston County by the

plaintiff guaranty company, looking to the adjudication of a number of claims asserted against it as surety upon a bond executed by it to the State of Washington to secure the performance of a public highway construction contract by the Puget Sound Engineering Company. We are here concerned only with the claim of title asserted by the defendant, C. W. Ryan, as trustee in bankruptcy of the engineering company, to certain equipment and supplies belonging to it and taken over by the guaranty company upon the abandoning of the contract. A trial in the Superior Court resulted in a judgment and decree which in part awards to the guaranty company a lien, and foreclosure thereof, upon the equipment and supplies, upon the theory that the guaranty company has a lien thereon in the nature of a pledge or chattel mortgage accompanied by possession, superior to the claim of title asserted by Ryan as trustee in bankruptcy for the engineering company. From so much of the judgment as decrees such award of lien to the guaranty company, Ryan, as trustee, has appealed to this court; claiming that he is entitled to a money judgment against the guaranty company for the value of such equipment and supplies so taken over by it from the engineering company, as for conversion thereof.

On July 21, 1919, the engineering company entered into a construction contract with the state for the grading and paving of a section of the Pacific highway in Clarke County, agreeing to do such construction work and furnish all necessary labor, equipment and supplies therefor for a stated con-

sideration. The following provisions of the contract are the only portions thereof we need here particularly notice:

“IV. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the State Highway Commissioner shall be at liberty, after three (3) days’ written notice to the Contractor, to provide any such labor or materials and deduct the cost thereof from any moneys then due or thereafter to become due to the Contractor under this contract; and if the State Highway Commissioner shall consider that such refusal, neglect or failure is sufficient ground for such action, he may, by written notice to the Contractor and to his Surety or its representatives, terminate the employment of the Contractor for said work, and enter upon the premises and take possession of all materials, tools and appliances thereon, for the purpose of completing the work included under this contract, and employ, by contract or otherwise, any person or persons to finish the work, and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, he shall not be entitled to receive any further balance of the amount to be paid under this contract until the work shall

be fully finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the State Highway Commissioner in finishing the work, such excess shall be paid by the State to the Contractor, but if such expense shall exceed unpaid balance, the Contractor shall pay the difference to the State Treasurer."

On the same day, in pursuance of stipulations in the contract, the engineering company, as principal, and the guaranty company as its surety, executed a bond to the state in the sum of \$205,485, conditioned, following appropriate references to the contract, as follows: [17]

"Now, therefore, if the Principal herein shall faithfully and truly observe and comply with the terms, conditions and provisions of the said contract in all respects, and shall well and truly and fully do and perform all matters and things by it undertaken to be performed under said contract, upon the terms proposed therein, and within the time prescribed therein, and shall indemnify the State of Washington against any direct or indirect damages that shall be suffered or claimed, for injuries to persons or property during the construction and improvement of such highway, and until the same is accepted, and shall pay all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such contractor or sub-contractors with provisions and supplies for the

carrying on of such work, and shall in all respects faithfully perform said contract according to law, then this obligation to be void, otherwise to remain in full force and effect."

On the same day, the engineering company executed and delivered to the guaranty company an indemnity agreement reading in part as follows:

"In consideration of the United States Fidelity and Guaranty Company (hereinafter called the Company) becoming surety on the bond of the Puget Sound Engineering Company (hereinafter called the Applicant) herein applied for, the Applicant hereby covenants and agrees

. . .

"And for the better protection of said Company, the Applicant does, as of the date hereof, hereby assign, transfer and convey to the said Company, all the right, title and interest of the Applicant in and to all the tools, plant, equipment and materials of every nature and description that it may now or hereafter have upon said work, or in, on or about the site thereof, including as well materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, . . . authorizing and empowering said Company, its authorized agents or attorneys to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts, and enforce, use and enjoy such possession upon the following conditions, viz.: This assignment shall be

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in full force and effect, as of the date hereof, should the Applicant fail to be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on its part under the said contract.”

This indemnity agreement was never officially recorded, either as a bill of sale or chattel mortgage. Soon thereafter the engineering company entered upon the performance of the contract and continued in such performance until about September 20, 1920, when it abandoned the work before completion thereof. On September 23, 1920, the engineering company, by written communication, notified the State Highway Board as follows:

“We are very sorry to have to advise you that for reasons beyond our control we are unable to proceed further with our contract for the construction of (here follows an appropriate reference to the work to be done under the contract).”

Thereupon the State Highway Board notified the guaranty company of the abandonment of the work by the engineering company and demanded of the guaranty company that it complete the work according to the construction contract for the performance of which it became surety. On September 25, 1920, in pursuance of a resolution of the board of directors of the engineering company, that company executed a bill of sale conveying to the guaranty company all of its equipment and supplies located along, upon or about the portion of the

highway covered by the construction contract. That bill of sale contained, among other [18] things, the following recital:

“It is understood that the party of the second part became a surety upon the bond which the party of the first part was required to give unto the State of Washington, for the faithful performance of a road contract between the points mentioned and heretofore described, and that the party of the first part has been unable, and is unable to complete the said road contract, and that the same has been required to be completed by the party of the second part, under the terms of its bond given unto the State of Washington, and that for the consideration above mentioned, and in pursuance to the contract existing between the party of the first part and the party of the second part entered into at the time the bond was given, all of this said personal property is being delivered and sold and transferred to the party of the second part for the purpose of enabling it to have and to hold the same, and the better to equip it to perform the said contract in accordance with the contract existing between the party of the first part, the party of the second part, and the State of Washington.”

On the same day, and in pursuance of the same resolution of its board of directors, the engineering company executed a second bill of sale conveying to the guaranty company five certain automobile trucks and one trailer, then at the place of the work,

evidently not intended to be conveyed by the first bill of sale; **which trucks and trailer** were held by the engineering company under conditional sales contracts, and hence liable to be reclaimed by the original vendors thereof; it being recited in that bill of sale that the guaranty company assumes no obligation to pay any balance due upon such conditional bills of sale. This seems to be the reason for the conveying of the engineering company's interest in these motors and trailer apart from the conveyance of the other property mentioned in the first bill of sale. Both of these bills of sale were duly placed on record in the auditor's office for Clarke County on September 30, 1920. Possession was taken by the guaranty company of all of the property described in these two bills of sale, immediately following their execution. At no prior time did the guaranty company ever take possession of any of the equipment or supplies in question. Soon thereafter the guaranty company caused the work under the construction contract to be proceeded with; the performance of which works was continued until its completion and the acceptance thereof of the State Highway Board on about February 1, 1921.

The property conveyed by the engineering company to the surety company by these two bills of sale was used and largely consumed or lost by the surety company in the completion of the work. The supplies were practically all so consumed, while the equipment was, to a large extent, consumed by being worn out, except as to the autotrucks and the trailer, which were repossessed by the original vendors

thereof under their conditional sales contracts, so that only a portion of all the equipment and supplies that was so taken over by the surety company remained in its hands after the completion of the work, and that portion apparently much depreciated in value by its use in the completion of the work. At the time of the abandoning of the work by the engineering company, it had incurred indebtedness for labor and materials in the prosecution of the work exceeding \$22,000 in amount. The guaranty company afterwards paid out approximately that sum in satisfaction of such claims, as it was required to do as surety.

On November 22, 1920, an involuntary petition in bankruptcy was filed against the engineering company in the federal court of this district, and such proceedings were had thereon that on December 16, 1920, the engineering company was adjudged by that Court to be bankrupt [19] and Ryan was thereupon appointed trustee of its property accordingly. As such trustee he thereafter demanded of the guaranty company that it deliver to him all of the equipment and supplies taken over by it under the bills of sale on September 25, 1920, which it, as we have seen, was almost wholly unable to do, and which it refused to do. Upon the commencement of this action in March, 1921, the trustee filed his answer therein demanding that the title to such property be decreed to be in him as of September 25, 1920, that the guaranty company be required to account for the value thereof, and that a money judgment be rendered against it in his favor accordingly; the issue so

made being determined by the trial court in favor of the guaranty company, as we have already noticed.

The principal contentions made in behalf of the trustee are, in substance, that, on September 25, 1920, when the guaranty company took over the possession of the equipment and supplies under the bills of sale from the engineering company, that company, was then insolvent, of which fact the guaranty company had reasonable cause to believe; and that therefore such transfer, being within four months prior to the filing of the petition in bankruptcy in the federal court, was void as an unlawful preference and subject to be set aside at the suit of the trustee, under the provisions of the federal bankruptcy law, and under the trust fund doctrine of this state relating to the rights of creditors of insolvent corporations.

The principal contentions made in behalf of the guaranty company are, in substance, that the transfer by the bills of sale and surrender of possession of the equipment and supplies to that company by the engineering company on September 25, 1920, related back and became effective in law as of the time of the execution of the above-quoted indemnity agreement on July 21, 1919, and that therefore such transfer was not void or voidable under the four months' rule of the federal bankruptcy law. Also that the engineering company was in fact not insolvent on September 25, 1920, when the transfer was made by the bills of sale and surrender of possession of the equipment and supplies, and that the

guaranty company had no reasonable cause to believe that the engineering company was then insolvent or likely to become insolvent by reason of such transfer or otherwise; and that therefore such transfer was not void or voidable as a preference under the federal or state law. Also that the transfer of the equipment and supplies was made for a present consideration passing from the guaranty company to the engineering company, consisting of the payments by the guaranty company of the claims incurred by the engineering company in the prosecution of the work, in an amount equal to or greater than the value of the equipment and supplies so transferred, and that therefore the transfer was not void or voidable as a preference. Also that the guaranty company became subrogated to all of the rights of the state entitling it to take over the equipment and supplies under the terms of Section 4 of the construction contract above quoted, and that therefore it should not be required to account to the trustee therefore.

We first inquire, was the engineering company insolvent on September 25, 1920, when it executed the bills of sale for, and surrendered possession of, its equipment and supplies to its surety, the guaranty company? It seems to us that there is little room for argument on this question. On September 23, 1920, the engineering company advised the state highway board that "for reasons beyond our control we are unable to proceed further with our contract" At about the same time the guaranty company was well advised of the engineering

company's inability to proceed with the work, and also that such inability was because of the financial embarrassment of that company. This was shown by the testimony of an agent of the guaranty company who had investigated the affairs of the engineering company. In the [20] resolution of the board of directors of the engineering company authorizing and directing the transfer of its equipment and supplies to the guaranty company, it is recited, as the reason for making such transfer, "It appearing manifest to the board of directors of this company that this company will not be able to complete the said contract." The first and principal bill of sale by the engineering company to the guaranty company executed on September 25, 1920, contains a recital in substance the same as this.

While these recitals in the resolution and the bill of sale do not in terms tell us that the engineering company's admitted inability to proceed further with the work under the contract was because of its financial inability to do so, it is plain, we think, from the other evidence in the case, and especially that of the guaranty company's own agent, that such confessed inability to proceed on the part of the engineering company was because it was unable to meet its financial obligations already incurred, and necessary to be incurred by it in the performance of its obligations under the construction contract. We are quite convinced that it is thus made plain by the evidence, not only that the engineering company was insolvent on September 25, 1920, when it transferred its equipment and

supplies to the guaranty company, but that that company then had actual knowledge of such insolvency. We decide this question apart from the fact of the later adjudication of the bankruptcy of the engineering company rendered by the Federal Court in the bankruptcy proceedings. We are assuming that that adjudication was not conclusive of the insolvency of the engineering company on September 25, 1920.

Was the transfer of the equipment and supplies effected on September 25, 1920, made for a present adequate consideration then, and not before then, passing to the engineering company? It is so contended in behalf of the guaranty company, with a view of demonstrating that there was no unlawful preference effected, as there might have been in the securing or satisfying of antecedent debts. Now it seems to be well settled that a surety liable for the default of his bankrupt principal becomes a creditor of such principal and the estate being administered in bankruptcy. 2 Black on Bankruptcy (3d ed.), Sec. 577. Just when such surety becomes such creditor may not be readily determinable under all circumstances, but we think it safe to assert that such surety becomes a creditor of his bankrupt principal, in any event, not later than the default of his principal, which fixes the liability upon him as surety. It might be said that up to that time the surety's liability is only potential, but we think his liability cannot, in any event, be so viewed thereafter. By the principal's default the surety's liability becomes fixed, though it

may be unliquidated as to amount. It follows, we think, that the guaranty company became a creditor of the engineering company not later than the default of that company in the performance of its construction contract, which plainly occurred not later than September 23, 1920, two days before the transfer of its equipment and supplies to the guaranty company by the execution of the bills of sale and surrender to that company of its equipment and supplies on September 25, 1920. We conclude that that transfer was not supported by any consideration then passing from the guaranty company to the engineering company, and that whatever the guaranty company then or thereafter did or promised to do toward the satisfaction of the engineering company's obligations under the construction contract, whether in the payment of claims theretofore incurred in the carrying on of the work, or in the carrying on of the work thereafter, was nothing more than the guaranty company was obligated to do under its bond which obligation had become fixed and not contingent upon the default of the engineering company on September 23, 1920. [21]

Should the transfer of the equipment and supplies finally effected by the bills of sale and surrender of possession on September 25, 1920, be held as relating back to and becoming effective as of the time of the making of the indemnity agreement of July 21, 1919, above quoted, viewing that agreement as, in form, a bill of sale for, or a chattel mortgage upon, the equipment and supplies? It

is so contended on behalf of the guaranty company, with a view of avoiding the effect of the four months' rule of the federal bankruptcy law. The answer to this question depends upon the validity of the indemnity agreement as a bill of sale or chattel mortgage, as against the trustee. We have seen that whatever interest the guaranty company acquired in the equipment and supplies by virtue of that agreement was only such interest as could be acquired therein by virtue of that agreement alone, unaccompanied by transfer of possession, and also unaccompanied by any official record thereof such as is required by our statutes relating to the recording of bills of sale and chattel mortgages. Of course, we are now concerned only with the question of the validity of that indemnity agreement as against the trustee. Prior to the passage of the amendment of 1910 to the federal bankruptcy law, the federal courts had adopted the view that a trustee in bankruptcy took no better title than that possessed by the bankrupt; so that whatever claim of title could be enforced as against the grantee, before he was adjudged bankrupt, could also be enforced as against the trustee; the law then existing being so finally settled by the decision of the federal supreme court in *York Manufacturing Co. vs. Cassell*, 201 U. S. 344, rendered in 1906. By the amendment of 1910 to Sec. 47 of the bankruptcy law, there was embodied therein, touching the property rights acquired by the trustee in bankruptcy, the following:

“Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.”

In *Pacific State Bank vs. Coats*, 205 Fed. 618, decided by the federal Circuit Court of Appeals for the Ninth Circuit in 1913, we find the following pertinent observations touching this amendment to the bankruptcy law:

“It is the purpose of this amendment to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. ‘The class of cases, unprovided for by the original act, and intended to be reached by the amendment,’ says Mr. Collier in his work on *Bankruptcy* (9th ed.) p. 659, ‘was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the poten-

tial rights of creditors potential with such liens.' 'This provision of the Bankruptcy Act,' says Witner, Judge, in *Re Hartdagen* (D. C.) 189 Fed. 546, 549, 26 Am. Bankr. Rep. 532, 535, 'Puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor,' distinguishing the case of *York Mfg. Co. vs. Cassell*, 201 U. S. 344, 26 Sup. Ct. Rep. 481, 50 L. Ed. 782, and others of its character, which it is thought inspired the amendment."

In *Potter Mfg. Co. vs. Arthur*, 220 Fed. 843, the federal Circuit Court of Appeals for the Sixth Circuit observed: [22]

"Under the rule of *York vs. Cassell*, *supra*, this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This rule has been changed by the amendment of June 25, 1910, to section 47a (2), providing that as to property 'in custody' the trustee 'shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings'; and, of course, the nature and extent of these 'rights, remedies and powers' must be determined by the law of the state, where not inconsistent with the Bankruptcy Act. There is general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in *York vs. Cassell* (*Remington*, vol. 3, Secs. 1137 and 1212½; *Loveland* (4th ed.) vol. 1, p. 767); and we think it clear

that such was the effect and that the trustee stands in the place of each creditor, and may assert the rights which any creditor would have had against the property 'in custody,' if that creditor, at the date of filing the petition in bankruptcy had been holding an execution levy."

Among numerous federal court decisions adhering to this view of the effect of the 1910 amendment, we note the following: Fairbanks Steam Shovel Co. vs. Wills, 240 U. S. 642; National Bank of Bakersfield vs. Moore, 247 Fed. 913; In re Schilling, 251 Fed. 966.

It is the law of the state that "A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property," unless placed of record within ten days after its execution in the office of the county auditor of the county wherein the property is situated (Sec. 3780, Rem. Comp. Stat.); and, also, that "no bill of sale for the transfer of personal property shall be valid as against existing creditors or innocent purchasers where the property is left in the possession of the vendor," unless it be recorded in the office of the county auditor of the county wherein the property is situated, within ten days after the sale (Sec. 5827, Rem. Comp. Stat.).

It seems plain to us, in the light of these provisions, that the guaranty company did not acquire any interest of any nature, by way of lien or otherwise, in the equipment and supplies of the engineer-

ing company under the indemnity agreement of July 21, 1919, except as between themselves, because of the want of recording of that agreement and the want of possession of the property being taken thereunder by the guaranty company before September 25, 1920, the date of the execution of the bills of sale and that that company did not even then acquire any interest in the equipment and supplies as against the trustee, if he then became vested with such title thereto for the benefit of the creditors of the bankrupt engineering company as is given to trustees in bankruptcy by the terms of the 1910 amendment of the federal bankruptcy law above quoted. Section 60 of the bankruptcy law sheds light upon this branch of our inquiry. It reads in part as follows:

“(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

“(b) If a bankrupt shall have . . . made a transfer of any of his property, and if, at the

time of the transfer, . . . or of the recording or registering of the transfer if by law recording or registering [23] thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the . . . transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such . . . transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.”

It seems to us, since the engineering company was insolvent, and known to be such by the guaranty company, at the time of the attempted final transfer of the equipment and supplies to the guaranty company on September 25, 1920; since that transfer occurred within four months prior to the filing of the petition in bankruptcy in the federal court on November 22, 1920; and since that transfer, if given effect, would work a preference in favor of the guaranty company, of which fact we are convinced, though not argued by counsel, other than that any such preference would not be unlawful, that the transfer became voidable at the suit of the trustee in the interest of the creditors of the bankrupt engineering company. In other words, the trustee became, by relation, as of date prior to the transfer of the equipment and supplies on September 25th,

“vested with all the rights, remedies and powers of a creditor holding a lien” against the equipment and supplies. Our decision in *Benner vs. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702, is in its reasoning, we think, all but conclusive in favor of the trustee upon this point. The decision of the federal district court for the western district of Washington, in *In re Puget Sound Engineering Co.*, 270 Fed. 353, cites and follows our decision in the *Benner* case.

Contention is made in behalf of the guaranty company that, in any event, it became subrogated to the right of the state to appropriate and use the equipment and supplies upon the default of the engineering company, because of the terms of section 4 of the construction contract above quoted; and that, having so used the equipment and supplies it should not now be held accountable for the value thereof to the trustee, further than for the proceeds of the sale of the remaining small portion of such equipment which is contemplated by the trial court's judgment to be made, and the proceeds thereof to be applied on its claim as a surety creditor of the engineering company. Several of our own decisions are cited to support this contention. We think, however, the holdings of those decisions, in so far as they can be considered as shedding lights in our present inquiry, are, in substance, that when, by the terms of a public improvement contract, the state or municipality is clearly required to withhold funds applicable to the payment of the contractor as a trust fund for the payment of those

furnishing labor and supplies, giving to such person preferred claims against such funds superior to that of the contractor, a surety of the contractor having paid such preferred claims is entitled to the portion of such funds as the persons whose claims it so pays were entitled to; and that when, by the terms of a public improvement contract, the state or municipality is not clearly required to so withhold funds applicable to the payment of the contractor, but is merely given an option to do so, one who may pay those furnishing labor and supplies upon the work does not acquire any such preferred claim against the fund which may remain in the hands of the state or municipality applicable to the payment of the contractor. *State ex rel. Bartelt vs. Liebes*, 19 Wash. 589, 54 Pac. 26; *Dowling vs. Seattle*, 22 Wash. 592, 61 Pac. 709; *First National Bank vs. Seattle*, 71 Wash. 122, 127 Pac. 837; *Maryland Casualty Co. vs. Washington National Bank*, 92 Wash. 497, 159 Pac. 689; *Northwestern National Bank vs. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, Ann. Cas. 1918D, 644; *National Surety Co. vs. American Savings Bank & Trust Co.*, 101 Wash. 213, 172 Pac. 264; *Denham vs. Pioneer* [24] *Sand & Gravel Co.*, 104 Wash. 357, 176 Pac. 333; *Beyer vs. Zindorf*, 116 Wash. 199, 198 Pac. 977.

Evidently it is by way of analogy that counsel for the guaranty company now hope to make their present contention effective, for we do not have here any question of a preference claim of the guaranty company against funds in the hands of

the state applicable to the payment of the engineering company as contractor. If there be some analogy between claimed rights of a surety to funds in the hands of the state applicable to the payment of his principal as contractor and claimed rights of the surety to the equipment and supplies of his principal contractor on hand at the time of such contractor's default still we are quite unable to see that such a claim to equipment and supplies can be tested other than by the terms of the construction contract. Now, by the terms of this construction contract, it seems plain to us that the state was in no sense obligated, upon the default of the engineering company, to take over the equipment and supplies on hand in trust for the benefit of the guaranty company as surety for the engineering company, or anyone else. It is true that the state could have rightfully taken over the equipment and supplies on hand if it choose to do so, and use them towards the completion of the contract; but it was not obliged to do so in the interest of anyone. No trust obligation whatever rested upon the state in that behalf, as when the state contracts to withhold funds for the benefit of labor or supply claims. The state could ignore all of the equipment and supplies of the engineering company then on hand and acquire other equipment and supplies for the finishing of the work, if it cared to finish the work itself, without being in the least liable on that account to anyone. Or it could ask and allow the guaranty company to complete the work, assuming an attitude of entire indifference as to whether the

guaranty company would use the equipment of the engineering company then on hand, which course the state elected to follow. This construction contract did not, by its terms, go further than to give the state the privilege as a mere option to "enter upon the premises and take possession of all materials, tools and appliances thereon, for the purpose of completing the work," using the language of the contract.

We conclude that the state, by the terms of the contract, did not become a trustee for the guaranty company for the performance of any such service in the interests of that company; and that the guaranty company should now be required to account to the trustee in bankruptcy for the value of the equipment and supplies, which manifestly was the property of the engineering company unencumbered by any trust resting thereon in the interests of anyone other than the state, which voluntarily abandoned whatever right it had to such property, as it was authorized to do by the construction contract.

It is now insisted in behalf of the trustee that a money judgment should be entered against the guaranty company, upon the record made in this case, for the value of the equipment and supplies taken over by that company from the bankrupt engineering company on September 25, 1920, as for an accounting by that company for such equipment and supplies. We agree that such a money judgment should be awarded to the trustee against the guaranty company because of its appropriation

of the equipment and supplies of the bankrupt engineering company. The Trial Court made no findings as to the value of the equipment and supplies so taken over by the guaranty company; evidently because it deemed such finding unnecessary in view of its disposition of the case. A careful review of the evidence touching the question of such value leaves us in considerable doubt as to its amount, [25] especially as to its amount chargeable to the guaranty company. We have concluded, however, in the light of such evidence as we have in the record, to fix the value of the equipment at \$10,000 and the value of the supplies at \$12,000, as chargeable against the guaranty company because of its appropriation thereof. In fixing such chargeable value as against the guaranty company, we have taken into consideration the fact that the trucks and trailer were lost to it by reason of them being repossessed by the original vendors thereof under their conditional sales contracts; such loss of the trucks and trailer being without legal fault of the guaranty company.

Our final conclusion, therefore, is that the judgment and decree of the Trial Court should be reversed, in so far as it awards to the guaranty company any interest in, or lien upon, the equipment and supplies; and that a money judgment should be awarded in favor of the trustee in bankruptcy and against the guaranty company in the sum of \$22,000. It is so ordered. The case is remanded to the Superior Court for further proceedings consistent with our views herein expressed. This con-

clusion, and all that we have said in this opinion, shall, of course, be hereafter considered as being wholly without prejudice to the rights of the guaranty company as a creditor entitled to share as such in the bankrupt estate; this, as we view it, being a question wholly within the province of the federal court to decide in the bankruptcy proceedings.

MAIN, C. J., FULLERTON, MACKINTOSH and TOLMAN, JJ., concur.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [26]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6460.

IN BANKRUPTCY—No. 6460.

In the Matter of PUGET SOUND ENGINEERING COMPANY, a Corporation, Bankrupt.

Order to Show Cause on Petition of United States Fidelity & Guaranty Company and Restraining Order.

On reading the petition of the United States Fidelity & Guaranty Company, a corporation, verified August 22d, 1923, on file herein and upon all the proceedings had in this cause, on motion of McClure & McClure, attorneys for the petitioner,

IT IS ORDERED:

1. That C. W. Ryan, as trustee in bankruptcy of the estate of the Puget Sound Engineering Company, a corporation, the above-named bankrupt, be and appear and show cause before this Court at the courtroom thereof in the United States courthouse at Seattle, Washington, in said District, on the 30th day of August, A. D. 1923, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why he, the said trustee, should not be stayed, enjoined and restrained from taking any proceedings to enforce collection or payment of a certain judgment entered July 30th, 1923, by the Superior Court of the State of Washington for Thurston County, in favor of the trustee and against the petitioner in cause No. 7974 on the records of said Superior Court, said cause being entitled United States Fidelity & Guaranty Company against James Allen, C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, et al., and said judgment being in the sum of Twenty-two Thousand Dollars (\$22,000.00) and costs. [27]

2. That the said C. W. Ryan, as trustee, as aforesaid, then and there show cause why the said United States Fidelity & Guaranty Company as claimant and petitioner herein is not entitled to set off against all liability under said judgment of said Superior Court of the State of Washington for Thurston County its claim in the sum of \$26,937.30 or so much thereof as shall be allowed and established by the Court, and further show cause, in

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case said setoff shall be denied, why said claim shall not be allowed in the sum of \$26,937.30 or such other sum as the Court shall determine.

3. That in the meantime, and until further order, the trustee be and he is hereby stayed, restrained and enjoined from taking any proceedings whatsoever to enforce collection or payment of said judgment by levy, seizure, execution or other process.

4. That delivery, on or before five (5) days from the date hereof, of a copy of said order duly certified by the clerk, together with a copy of the petition certified by the attorneys of the petitioner to the said trustee by any person qualified to serve a summons under the laws of the State of Washington, shall be sufficient in service in the premises.

Done in open court this 22d day of August, A. D. 1923.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 22, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [28]

In the United States District Court for the Western
District of Washington, Northern Division.

In Bankruptcy—No. 6460.

In the Matter of the PUGET SOUND ENGINEER-
ING COMPANY, a Corporation, Bankrupt.

Affidavit in Compliance With Order to Show Cause.

United States of America,
District and State of Washington,
County of Clarke,—ss.

Comes now C. W. Ryan, trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, a bankrupt, and in compliance with the order to show cause issued in the above-entitled court on the 22d day of August, 1923, upon being duly sworn, on oath says:

That on or about the 11th day of March, 1921, there was filed by the petitioner herein for an order to show cause, the United States Fidelity & Guaranty Company, a corporation, as plaintiff, a complaint against C. W. Ryan as trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, bankrupt, this affiant, et al., in the Superior Court of the State of Washington, for Thurston County, a copy of which complaint is herewith attached and marked Exhibit "A" and prayed to be read as a part hereof.

Thereafter the affiant, C. W. Ryan, as trustee in bankruptcy, as aforesaid, filed in said Superior Court of the State of Washington, for Thurston County, an answer, copy of which answer is herewith attached and prayed to be read as a part hereof and marked Exhibit "B."

And thereafter the said United States Fidelity & Guaranty [29] Company, a corporation, filed in said cause a reply to said answer, copy of which

reply is herewith attached marked Exhibit "C" and prayed to be read as a part hereof.

That said pleadings in said cause heretofore referred to constituted and made an issue in said cause, which issue was tried out before the said Superior Court of the State of Washington for Thurston County and resulted in a decision in favor of said United States Fidelity & Guaranty Company, a corporation, plaintiff, and against the affiant, one of said defendants, wherein it was ordered that said affiant, as trustee in bankruptcy herein, recover nothing from said plaintiff; that thereafter this affiant, as trustee in bankruptcy herein, appealed said cause to the Supreme Court of the State of Washington, notice of which appeal is hereto attached and marked Exhibit "D," and said matter by said Supreme Court of the State of Washington was duly heard upon appeal, both the plaintiff and this affiant herein appearing, and that said Supreme Court of the State of Washington having jurisdiction of said cause, after due consideration, reversed the action of the Superior Court of the State of Washington for Thurston County in granting judgment in favor of plaintiff and against the defendant, and remanded said cause to said Superior Court with instructions to enter judgment against the plaintiff in favor of your affiant as trustee, defendant in said suit, for the sum of \$22,000.00.

That thereafter the plaintiff herein filed a petition for rehearing before the Supreme Court of the State of Washington in said cause and said rehearing was denied, whereupon the Supreme

Court of the State of Washington caused to be filed with the Superior Court of the State of Washington for Thurston County a *remittitur* directing the said Superior Court to enter judgment against the United States Fidelity & Guaranty Company, a corporation, plaintiff therein, and in favor of the affiant as trustee of the Puget Sound Engineering Company, a corporation, bankrupt, in the sum of \$22,000.00. [30]

That thereafter on the 30th day of July, 1923, the Superior Court of the State of Washington for the County of Thurston entered judgment in the following words and figures, to wit:

“The above-entitled cause having been tried before this Court, and a judgment entered herein on the 21st day of November, 1921, from which judgment an appeal was taken by C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, and such appeal thereafter prosecuted in the Supreme Court of the State of Washington, in so far as said judgment failed to give judgment in favor of said C. W. Ryan, as trustee, etc., as against the plaintiff, and said judgment upon appeal having been by the Supreme Court of the State of Washington ordered reversed as to that portion thereof contained under paragraphs V and VI thereof, and the said cause remanded to this court with instructions to enter judgment in accordance with the opinion of said Supreme Court heretofore filed, and a *remittitur* having been filed herein on the 14th day of July, 1923, attached to which is the opinion of said Supreme Court, which

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remittitur is in the following words and figures,
to wit:

“ ‘In the Supreme Court of the State of Washing-
ton.

May Session, A. D. 1923.

‘BE IT REMEMBERED, That at a regular session
of the Supreme Court of the State of Washing-
ton, begun and holden at Olympia on the sce-
ond Monday of May, A. D. 1923, it being the
fourteenth day of said month, among other the
following was had and done, to wit:

No. 17326.

UNITED STATES FIDELITY & GUARANTY
COMPANY,

Respondent,

vs.

JAMES ALLEN et al.,

Defendants.

C. W. RYAN, as Trustee in Bankruptcy for the
PUGET SOUND ENGINEERING COM-
PANY,

Appellant.

JUDGMENT.

Friday, July 13, 1923.

‘This cause having been heretofore submitted to
the Court, upon the transcript of the record of the
Superior Court of Thurston County, and upon the
argument of counsel, and the Court having fully

considered the same, and being fully advised in the premises, it is now on this 13th day of July, A. D. 1923, on motion of McMaster, Hall & Schaefer, counsel for appellant, considered, adjudged and decreed, that the judgment of the Superior Court be and the same is hereby reversed and remanded with instructions to enter judgment in accordance with the opinion heretofore filed, with costs; the petition for rehearing denied, [31] and that the said C. W. Ryan, as trustee, etc., have and recover of and from the said United States Fidelity & Guaranty Company, the costs of this action taxed and allowed at Two Hundred Fifty-one and 95/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

‘I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is true copy of the judgment and decree in said cause, as the same now remains of record in my office.

‘IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court at Olympia, this 13th day of July, A. D. 1923.

[Seal]

FRED S. GUYOT,

Dep. Clerk of the Supreme Court of the State of Washington.’

“NOW THEREFORE, by virtue of the law and the premises aforesaid, it is by the Court

ORDERED, CONSIDERED, ADJUDGED AND
DECREEED

that C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, have and recover of and from said United States Fidelity & Guaranty Company, a corporation, organized and existing under the laws of the State of Maryland, the sum of Twenty-two Thousand Dollars (\$22,000.00), together with costs taxed by the Supreme Court of the State of Washington at Two Hundred and Fifty-one and 95/100 Dollars (\$251.95) and costs taxed herein at Thirteen Dollars (\$13.00); and that execution issue therefor.

“Dated in open court this 30th day of July, 1923,
A. D.

Judge.” [32]

C. W. RYAN.

Subscribed and sworn to before me, a notary public for the State of Washington, County of Clarke, this 27th day of August, 1923.

[Seal]

CHARLES W. HALL,

Notary Public for Washington, Residing at Vancouver.

SIDNEY TEISER,

McMASTER, HALL & SCHAFFER,

Attorneys for Trustee C. W. Ryan. [33]

Exhibit "A."

In the Superior Court of the State of Washington
for the County of Thurston.

No. —.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner;
C. W. CLAUSEN, as State Auditor; CLIF-
FORD L. BABCOCK, as State Treasurer;
C. W. RYAN, as Trustee in Bankruptcy of
Puget Sound Engineering Company, a Cor-
poration; A. N. ALLEN, Sole Trader, Doing
Business Under the Trade Name of ALLEN
GARAGE; ALLEN & LEWIS, a Corpora-
tion; C. E. BRALEY and L. B. CUSICK,
Partners Doing Business Under the Firm
Name of BRALEY & CUSICK; J. G. BEN-
NETT, Sole Trader, Doing Business Under
the Trade Name of BENNETT HARD-
WARE COMPANY; M. BARDE & SONS,
INC., a Corporation; J. L. BROCK; CLYDE
EQUIPMENT COMPANY, a Corporation;
J. W. CRAMER, Sole Trader, Doing Busi-
ness Under the Trade Name of MAPLE-
WOOD DAIRY FARM; F. T. CROWE &
CO., a Corporation; COAST STEEL & MA-
CHINERY CO., a Corporation; CONTRAC-

TORS' MACHINERY & STORAGE CO., a Corporation; P. A. CHRISTENSON and LLOYD A. CHRISTENSON, Partners, Doing Business Under the Firm Name of CHRISTENSON & SON; E. G. DITLEVSEN, Sole Trader, Doing Business Under the Trade Name of SANITARY MEAT MARKET; GEORGE L. DUBOIS, W. B. DUBOIS and JOS. J. DONOVAN, Partners, Doing Business Under the Firm Name of DUBOIS MILL COMPANY; DANVILL CO., a Corporation; CHARLES DAHL and L. PENNE, Partners, Doing Business Under the Firm Name of DAHL & PENNE; F. L. EVANS; I. N. FLEISCHNER, M. FLEISCHNER, M. A. MAYER, SAM SIMON, JOSEPHINE HIRSCH, SANFORD HIRSCH and NATHAN STRAUSS, Partners, Doing Business Under the Firm Name of FLEISCHNER, MAYER & CO.; FEENAUGHTY MACHINERY CO., a Corporation; FULLINWIDER MEAT COMPANY, a Corporation; GREELY'S FORD GARAGE, a Corporation; GREAT NORTHERN RAILWAY CO., a Corporation; GEORGE GODDARD; ELIZABETH GODDARD; W. FOSTER HIDDEN and OLIVER M. HIDDEN, Partners, Doing Business Under the Firm Name of HIDDEN BROS.; HONEYMAN HARDWARE CO., a Corporation; H. E. JOHNSON; J. P. LEE; A. B. McCOY, Sole Trader, Doing

Business Under the Trade Name of McCOY AUTO CO.; [34] MARSHALL-WELLS CO., a Corporation; J. M. MURPHY and B. C. THOMPSON, Partners, Doing Business Under the Firm Name of MURPHY & THOMPSON; MITCHELL, LEWIS & STAVELAND CO., a Corporation; MEESE & GOTTFRIED COMPANY, a Corporation; NIKUM & KELLY SAND & GRAVEL CO., a Corporation; NORTHERN PACIFIC RAILWAY CO., a Corporation; PACIFIC DERRICK & HOIST CO., a Corporation; R. H. O'NIELL, C. L. PECK and B. McCORMACK, Partners, Doing Business Under the Firm Name of PECK-O'NIELL LUMBER CO.; PORTLAND MACHINERY CO., a Corporation, RIDGEFIELD STATE BANK, a Corporation; JOHN A. ROEBLINGS SONS CO. OF CALIFORNIA, a Corporation; L. CLAY SPARKS, M. RENIE SPARKS and HARRY W. SPARKS, Partners, Doing Business Under the Firm Name of SPARKS HARDWARE CO.; L. CLAY SPARKS, M. RENIE SPARKS and HARRY W. SPARKS, Partners, Doing Business Under the Firm Name of SPARKS AUTO SUPPLY CO.; JOHN A. SAUERMAN, Sole Trader, Doing Business Under the Firm Name of SAUERMAN BROS.; V. U. HERMAN, Sole Trader, Doing Business Under the Firm Name of SALMON CREEK GARAGE; STANDARD

OIL CO., a Corporation; WILLIAM TENNY; UNION BRIDGE CO., a Corporation; LEWIS SHATTUCK and E. E. SLERET, Partners, Doing Business Under the Firm Name of UNIVERSAL AUTO CO.; UNITED STATES RUBBER COMPANY, a Corporation; UNION NATIONAL BANK OF SEATTLE, a Corporation; UNION OIL COMPANY OF CALIFORNIA, a Corporation; VANCOUVER NATIONAL BANK, a Corporation; WEBBER MACHINE WORKS, a Corporation; THE WESTERN SALES CO., INC., a Corporation; WINTERS & BROOKINGS, a Corporation; HARRY WOLFE; ZIMMERMAN-WELLS-BROWN CO., a Corporation,

Defendants.

COMPLAINT.

Plaintiff complains and alleges:

I.

That at all the times in this complaint mentioned plaintiff was and now is a corporation organized and existing under the laws of the State of Maryland, and was and is authorized and empowered by its articles of incorporation and the laws of said State of Maryland to do a general surety business, and was and is qualified to do business in the State of Washington as a surety company and has paid to the State of Washington its annual corporation license fee last due.

II.

That at all the times in this complaint mentioned the defendant James Allen was and now is Highway Commissioner of the State of Washington, and the defendant C. W. Clausen was and now is Auditor of the State of Washington, and that the defendant Clifford L. Babcock now is Treasurer of the State of Washington.

III.

That at all the times in this complaint mentioned the following named defendants were and now are respectively partners doing business under the following partnership names, respectively:

C. E. Braley and L. B. Cusick as Braley and Cusick.

P. A. Christenson and Lloyd A. Christenson as Christenson & Son. [35]

Charles Dahl and L. Penne as Dahl & Penne.

Geo. L. DuBois, W. B. DuBois and Jos. J. Donovan as DuBois Mill Company.

I. N. Fleischner, M. Fleischner, M. A. Mayer, Sam Simon, Josephine Hirsch, Sanford Hirsch and Nathan Strauss as Fleischner, Mayer & Co.

W. Foster Hidden and Oliver M. Hidden as Hidden Bros.

J. M. Murphy and B. C. Thompson as Murphy & Thompson.

R. H. O'Niell, C. L. Peck and B. McCormack as Peck-O'Niell Lumber Co.

L. Clay Sparks, M. Renie Sparks and Harry W. Sparks as Sparks Hardware Co.

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L. Clary Sparks, M. Renie Sparks and Harry W. Sparks as Sparks Auto Supply Co.

Lewis Shattuck and E. E. Sleret as Universal Auto Co.

IV.

That at all the times in this complaint mentioned the following named defendants were and now are respectively doing business as sole traders under the following trade names, respectively:

A. N. Allen as Allen Garage.

J. G. Bennett as Bennett Hardware Company.

J. W. Cramer as Maplewood Dairy Farm.

E. G. Ditlevsen as Sanitary Meat Market.

V. U. Herman as Salmon Creek Garage.

A. B. McCoy as McCoy Auto Co.

John A. Sauerman as Sauerman Bros.

V.

That at all the times in this complaint mentioned the following named defendants were and now are corporations organized and existing under the laws of the following states, respectively:

Under the laws of the State of Washington:

F. T. Crowe & Co.

Contractors' Machinery & Storage Co.

Danvill Co.

Fullinwider Meat Company.

Greeley's Ford Garage.

Pacific Derrick & Hoist Co.

Ridgefield State Bank.

Webber Machine Works.

Under the laws of the State of Oregon:

Allen & Lewis.

M. Barde & Sons, Inc.

Coast Steel & Machinery Co.

Feehaughty Machinery Co.

Honeyman Hardware Co.

Mitchell, Lewis & Staver Co.

Nikum & Kelly Sand & Gravel Co.

Portland Machinery Co.

Union Bridge Co.

The Western Sales Co., Inc.

Winters & Brookings.

Zimmerman-Wells-Brown Co.

Under the laws of the State of California:

Messe & Gottfried Company.

John A. Roeblings Sons Co. of California.

Standard Oil Co.

Union Oil Company of California.

Under the laws of the State of New Jersey:

Marshall-Wells Co.

United States Rubber Company.

Under the laws of the State of Maine:

Clyde Equipment Company.

Under the laws of the State of Minnesota:

Great Northern Railway Co. [36]

Under the laws of the State of Wisconsin:

Northern Pacific Railway Co.

Under the National Banking Act:

Vancouver National Bank.

Union National Bank of Seattle.

VI.

That at all the times in this complaint mentioned the Puget Sound Engineering Company was and now is a corporation organized and existing under

the laws of the State of Washington with its principal place of business at Seattle, King County, in said state, and that December 16, 1920, it was adjudicated bankrupt by order on said day entered by the District Court of the United States for the Western District of Washington, Northern Division, in cause No. 6460 on the records of said court, on an involuntary petition filed in said court and cause November 22, 1920, and that said bankruptcy cause was December 16, 1920, referred by said Court to the Honorable C. R. Hawkins, Referee, at Seattle, for further proceedings as provided by law, and that February 1, 1921, at the first meeting of creditors of said corporation, held, after due notice, before the referee in bankruptcy, C. W. Ryan was duly appointed trustee in bankruptcy of said bankrupt, and thereupon duly qualified and entered upon the discharge of his duties as such trustee, and ever since has been and now is the duly appointed, qualified and acting trustee of said bankrupt.

VII.

That on or about the 21st day of July, 1919, the Puget Sound Engineering Company, a corporation, and the State of Washington, acting through the State Highway Board, under and by virtue of Chapter 186 of the laws of 1909 of the State of Washington, made and entered into a certain agreement in writing wherein and whereby the said Puget Sound Engineering Company, a Corporation, agreed to do all the work and furnish all the material for grading, draining and paving with con-

crete a portion of the Pacific Highway between Salmon Creek and Pioneer (Permanent Highway No. 2-B), Clarke County, Washington, Post Road Project No. 34, between station 257+30.6 and station 606+60 in accordance with and as described in the plans, general stipulations and specifications attached thereto, for the price set forth in the proposal and schedule of rates and prices attached to said contract. A copy of said contract and the documents thereto attached (omitting the plans and specifications) is hereto annexed marked Exhibit "A" and is hereby referred to and hereby made a part hereof.

VIII.

That the State of Washington, for the purpose of securing the performance of said contract by said Puget Sound Engineering Company, required a surety bond from said company in the full amount of the contract conditioned for the faithful performance thereof according to law.

IX.

That thereupon the Puget Sound Engineering Company made application to the plaintiff for said bond and that thereafter and on or about July 21, 1919, upon said application, the plaintiff executed and delivered to the Puget Sound Engineering Company its bond conditioned as aforesaid in the full amount of said contract price; and that the Puget Sound Engineering Company thereupon delivered said bond to the State of Washington and that said bond ever since has been, and now is, on file with the State of Washington. A copy of said bond is

hereto annexed marked Exhibit "B" and is hereby referred to and made a part hereof.

X.

That at the time this plaintiff made, executed and delivered the surety bond hereinabove mentioned, and as a part of the same transaction, the said Puget Sound Engineering Company made, executed and delivered to plaintiff in writing said company's agreement of indemnity, in which among other things said Puget Sound Engineering Company did stipulate and agree with the plaintiff as follows:

In consideration of the United States Fidelity and Guaranty Company (hereinafter called the Company) becoming surety on the bond of the Puget Sound Engineering Company (hereinafter called the Applicant) herein applied for, the Applicant hereby covenants and agrees to pay in advance the premiums * * * annually for the contract bond, and an additional premium to be adjusted and paid upon completion of the contract, based on any increase of the original contract [37] price; such annual payments to be made until it shall deliver to said company at its Home Office in the city of Baltimore, competent written evidence of its discharge from such suretyship and from all liability by reason thereof. In further consideration of its becoming surety as above, the Applicant hereby covenants and agrees to indemnify the Company and save it harmless against all loss, cost, damage, charge, and ex-

pense that may accrue to it, whether sustained or incurred by reason of any act, default or neglect of the Applicant, or on account of claims made under or in connection with the said bond or any extension or continuation thereof; the Applicant agreeing to repay to said Company all such loss, cost, damage, charge and expense, including the fees or other compensation and expenses of any or all attorneys and agents employed by it to investigate or adjust such claims.

And for the better protection of said Company, the Applicant does, as of the date hereof, hereby assign, transfer and convey to the said Company, all the right, title and interest of the Applicant in and to all the tools, plant, equipment and materials of every nature and description that it may now or hereafter have upon said work, or in, on or about the site thereof, including as well materials purchased for or chargeable to said contract, which may be in process of construction, on storage elsewhere, or in transportation to said site, hereby assigning and conveying also all its rights in and to all sub-contracts, which have been or may hereafter be entered into, and the materials embraced therein, and authorized and empowering said Company, its authorized agents or attorneys, to enter upon and take possession of said tools, plant, equipment, materials and sub-contracts and enforce use and enjoy such possession upon the following conditions, viz.: This

assignment shall be in full force and effect, as of the date hereof, should the Applicant fail or be unable to complete the said work in accordance with the terms of the contract covered by said bond, or in event of any default on its part under the said contract.

In further consideration of the execution of the said bond, the Applicant hereby agrees, as of this date, that the said Company shall, as surety on said bond, be subrogated to all its rights, privileges and properties as principal and otherwise in said contract, and it hereby assigns, transfers and conveys to said Company all the deferred payments, and retained percentages, and any and all moneys and properties that may be due and payable to the Applicant at the time of such breach or default, or that may thereafter become due and payable to it on account of said contract, or on account of extra work or materials supplied in connection therewith, hereby agreeing that all such moneys, and the proceeds of such payments and properties, shall be the sole property of the said Company and to be by it credited upon any loan, cost, damage, charge and expense sustained or incurred by it as above under its bonds of suretyship.

We hereby further agree that the vouchers or other evidence of payments made by the said Company under its obligations of suretyship shall be conclusive against the Applicant, of the fact and extent of the liability of the Ap-

plicant to the said Company under said obligation, whether said payments were made to discharge a penalty thereunder, incurred in the investigation of a claim made thereon, adjusting a loss or claim in connection therewith, or in completing the work covered by said contract, and whether voluntarily made or paid after suit and judgment against said Company.

XI.

That upon the execution and delivery of said contract and bond as hereinabove set forth the defendant Puget Sound Engineering Company entered upon the performance of said contract and continued therein until, on, to wit, September 20th, 1920. On said last named date said defendant Puget Sound Engineering Company defaulted in the performance of said contract and abandoned and refused to carry out and complete the same and served notification to that effect upon the State Highway Commissioner.

XII.

That thereupon the State Highway Board cancelled and terminated said contract and all rights of the defendant the Puget Sound Engineering Company to complete or carry out the same, and in writing notified this plaintiff to take over and complete said contract in accordance with the terms thereof.

XIII.

That this plaintiff upon investigation discovered that said Puget Sound Engineering Company was

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in default in payments of claims of laborers for work and labor performed upon said contract and in payment of claims for materials and supplies, the plaintiff did thereupon pay to the individual laborers for work performed for said Puget Sound Engineering Company their various claims, and did pay certain of said claims for materials and supplies, taking assignments thereof to D. H. McColister as agent for this plaintiff, the total amount so paid by this plaintiff as aforesaid being the sum of Seventeen thousand nine hundred and forty-five dollars and 61 cents (\$17,945.61). [38]

XIV.

That on September 25th, 1920, and at the same time this defendant paid a large part of the laborers' claims as aforesaid, this plaintiff entered upon and took possession of all the work under said contract, and thereupon and as part of that transaction the said Puget Sound Engineering Company did turn over and deliver the said work to the plaintiff, and did, pursuant to the indemnity agreement mentioned and referred to in paragraph X hereof, make, execute, acknowledge and deliver unto this plaintiff its certain bill of sale wherein and whereby the said Puget Sound Engineering Company did sell, assign, transfer and set over unto this plaintiff all the personal property, consisting of machinery, tools, equipment, materials and supplies of every kind and nature whatsoever, owned and possessed by said Puget Sound Engineering Company and located upon said highway for the purpose of enabling this plaintiff to have and to

hold the same and to equip it to perform the said contract with the State of Washington for the construction of said highway, which said bill of sale was thereafter filed in the office of the auditor of Clarke County, Washington, on the 30th day of September, A. D. 1920, at the hour of 2:01 o'clock P. M., and was thereafter recorded in Book E, Records of Bills of Sale, on page 401, of the records of said Clarke County; and at the same time and place and as part of the same transaction the said Puget Sound Engineering Company did make, execute, acknowledge and deliver unto this plaintiff a bill of sale in writing conveying to this plaintiff all of the right, title and interest of said Puget Sound Engineering Company in certain trucks and trailers held and possessed by said Puget Sound Engineering Company under certain contracts of conditional sale, which said last named bill of sale was thereafter filed for record in the auditor's office of Clarke County, Washington, on the 30th day of September, 1920, at two o'clock P. M., and was thereafter recorded in volume E of Bills of Sale, at page 400, records of said Clarke County; and that the said supplies, material, tools, plant and equipment so taken possession of by this plaintiff on said September 25th, 1920, ever since have been and are now in the possession of this plaintiff with the exception of such portions thereof as were used, exhausted and worn out in the completion of said contract, and with the exception of certain of said trucks which have been repossessed by the holders of the contract of conditional sale above mentioned.

XV.

That on September 20, 1920, the total amount earned by said Puget Sound Engineering Company under said contract with the State of Washington aforesaid was the sum of one hundred fifty-eight thousand two hundred eighty-eight and 49/100 dollars (\$158,288.49), of which there had been paid unto said Puget Sound Engineering Company the sum of one hundred thirty-eight thousand one hundred eighty-four and 67/100 dollars (\$138,184.67), and the sum of thirty-two thousand forty-six and 16/100 dollars (\$32,046.16), was held and retained by the State of Washington as the twenty per cent (20%) required and provided by section VII of said contract to be retained until claims against said contract and against the bond given by this plaintiff shall have been satisfied and paid and receipted for in full; that included in said Thirty-two thousand forty-six and 16/100 Dollars (\$32,046.16) is the sum of One thousand nine hundred forty-two and 34/100 Dollars (\$1,942.34) earned by this plaintiff in completing said contract after said work had been abandoned by said Puget Sound Engineering Company, and its contract cancelled and terminated by the State Highway Board, as herinabove alleged, which sum of One thousand nine hundred forty-two and 34/100 Dollars (\$1,942.34) belongs to this plaintiff.

XVI.

That the plaintiff entered upon the completion of said work immediately after the cancellation and termination of said contract by the State Highway

Board, as hereinabove alleged, and that said work was fully completed by the plaintiff and was accepted by the State of Washington on February 1st, 1921; that the following named defendants within thirty (30) days after the date of the completion and acceptance of said work as aforesaid filed with the defendant James Allen as State Highway Commissioner claims against said contract and against the bond given by this plaintiff as surety for labor, material and supplies furnished in the construction of said work as follows:

A. N. Allen, sole trader, doing business under the trade name of Allen Gar- age	\$ 421.94
Allen & Lewis, a corporation	319.00
C. E. Braley and L. B. Cusick, partners doing business under the firm name of Braley & Cusick.....	66.95
J. G. Bennett, sole trader, doing business under the trade name of Bennett Hardware Company	186.01
[39]	
M. Barde & Sons, Inc., a corporation....	654.35
L. J. Brock	18.00
Clyde Equipment Company, a corpora- tion	554.50
J. W. Cramer, sole trader, doing business under the trade name of Maplewood Dairy Farm	60.00
F. T. Crowe & Co., a corporation	1,780.29
Coast Steel & Machinery Co., a corpora- tion	160.00

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Contractors' Machinery & Storage Co., a corporation	500.00
P. A. Christenson and Lloyd A. Christ- enson, partners, doing business un- der the firm name of Christenson & Son	876.19
E. G. Ditlevsen, sole trader, doing busi- ness under the trade name of Sani- tary Meat Market	296.95
George L. DuBois, W. D. DuBois and Jos. J. Donovan, partners, doing business under the firm name of Du- Bois Mill Company	640.46
Danvill Co., a corporation	210.00
Charles Dahl and L. Penne, partners, do- ing business under the firm name of Dahl & Penne	68.63
F. L. Evans	390.00
I. N. Fleischner, M. Fleischner, M. A. Mayer, Sam Simon, Josephine Hirsch, Sanford Hirsch, and Nathan Strauss, partners, doing business un- der the firm name of Fleischner, Mayer & Co.	117.25
Feenaughty Machinery Co., a corpora- tion	48.89
Fullinwider Meat Company, a corpora- tion	12.68
Greely's Ford Garage, a corporation ...	138.08
Great Northern Railway Co., a corpora- tion	208.33

Great Northern Railway Co., a corporation (assigned to Vancouver National Bank, a corporation)	330.67
George Goddard	140.00
Elizabeth Goddard	225.00
W. Foster Hidden and Oliver M. Hidden, partners, doing business under the firm name of Hidden Bros.	410.48
Honeyman Hardware Co., a corporation	226.88
H. E. Johnson	175.00
J. P. Lee	12.00
A. B. McCoy, sole trader, doing business under the trade name of McCoy Auto Co.	194.96
Marshall-Wells Co., a corporation	610.34
J. M. Murphy and B. C. Thompson, partners, doing business under the firm name of Murphy & Thompson (assigned to Ridgefield State Bank, a corporation)	27.70
Mitchell, Lewis & Staver Co., a corporation	506.65
Meese & Gottfried Company, a corporation	6.65
Nikum & Kelly Sand & Gravel Co., a corporation	4,375.75
Northern Pacific Railway Co., a corporation (assigned to Vancouver National Bank, a corporation)	27.00
Pacific Derrick & Hoist Co., a corporation	55.50

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R. H. O'Niell, C. L. Peck and B. McCormack, partners, doing business under the firm name of Peck-O'Niell Lumber Co.	15.96
Portland Machinery Co., a corporation..	95.70
John A. Roeblings Sons Co., of California, a corporation	739.53
L. Clay Sparks, M. Renie Sparks and Harry W. Sparks partners, doing business under the firm name of Sparks Hardware Co.	218.72
L. Clay Sparks, M. Renie Sparks and Harry W. Sparks, partners, doing business under the firm name of Sparks Auto Supply Co.	384.23
John A. Sauerman, sole trader, doing business under the firm name of Sauerman Bros.	258.08
V. U. Herman, sole trader, doing business under the firm name of Salmon Creek Garage	211.57
Standard Oil Co., a corporation	4,198.05
[40]	
William Tenny	1,048.18
Union Bridge Co., a corporation	263.02
Lewis Shattuck and E. E. Sleret, partners, doing business under the firm name of Universal Auto Co.	66.40
United States Rubber Company, a corporation	96.28
Union Oil Company of California, a corporation	64.09

Webber Machine Works, a corporation..	345.10
The Western Sales Co., a corporation...	559.50
Winters & Brookings, a corporation.....	18.80
Harry Wolfe	150.00
Zimmerman-Wells-Brown Co., a corpora- tion	1,032.49
<hr/>	
Total	\$24,818.78

XVII.

That because and by reason of the payments made by this plaintiff to laborers and for materials and supplies as set forth in paragraph XVI hereof this plaintiff became subrogated to all the rights of said laborers and material and supply men to the extent of payments made to them as aforesaid in the total sum of Seventeen thousand nine hundred forty-five and 61/100 Dollars (\$17,945.61), and that this plaintiff is entitled to be reimbursed and repaid the whole of said sum out of the said sum of Thirty-two thousand forty-six and 16/100 Dollars (\$32,046.16) reserved and retained by the State of Washington as aforesaid.

XVIII.

That the defendant Union National Bank of Seattle claims to have some interest in or claim to the said amount so retained by the State of Washington, but this plaintiff alleges that such interest, if any, is subsequent, subject and inferior to the claims of each of the defendants mentioned in paragraph XVI hereof.

XIX.

That the defendant, C. W. Ryan, as trustee in

bankruptcy of the Puget Sound Engineering Company, a corporation, claims to have some interest in or claim to the said amount so retained by the State of Washington, but this plaintiff alleges that such interest, if any, is subsequent, subject and inferior to the claims of each of the defendants mentioned in paragraph XVI hereof, and to the claim of this plaintiff thereto.

XX.

That in the completion of said contract as aforesaid this plaintiff sustained a loss, the exact amount of which is not ascertainable, but which the plaintiff believes, and thereupon alleges the fact to be, will exceed the sum of Fifteen Thousand Dollars (\$15,000.), which said sum constitutes and is a lien upon the moneys retained by the State of Washington as aforesaid and such of the machinery, plant, equipment, tools, material and supplies as are now remaining in its hands and taken over by it from the Puget Sound Engineering Company under the bills of sale hereinabove mentioned and referred to in paragraph XIY hereof.

WHEREFORE plaintiff prays judgment as follows:

1st. That said defendants, and each of them, be required to be and appear before this Court and to establish such claims as they may severally have against the said Puget Sound Engineering Company, the said sum of Thirty-two Thousand Forty-six and 16/100 Dollars (\$32,046.16) retained and reserved by the State of Washington as aforesaid,

and against the bond given by this plaintiff to the State of Washington as surety for said Puget Sound Engineering Company as aforesaid.

2d. That this plaintiff have a claim against the said sum of Thirty-two Thousand Forty-six and 16/100 Dollars (\$32,046.16) reserved and retained by the State of Washington as aforesaid in the sum of Seventeen Thousand Nine Hundred Forty-five and 61/100 Dollars (\$17,945.61) advanced by it as hereinbefore alleged for the purpose of paying the claims of laborers and material and supply men who performed services upon said work and furnished such materials and supplies.

3d. That the Union National Bank of Seattle and C. W. Ryan as trustee in bankruptcy of the Puget Sound Engineering Company be adjudged by this Court to have no right, title, claim to or interest in the said [41] sum of Thirty-two Thousand Forty-six and 16/100 Dollars (\$32,046.16), or any part thereof, untill all of the claims of the defendants entitled to claim the same and all the claims of this plaintiff in, to and against said fund shall have first been paid in full.

4th. That this Court adjudge and determine the amount due to this plaintiff by reason of the loss incurred by it in the completion of said contract, and that this plaintiff be adjudged and decreed to have a lien upon the moneys so retained by the State of Washington and also a lien, prior, paramount and superior to the interest of any of the defendants herein, in, upon and against all that portion of the plant, machinery, tools, equipment, material and

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supplies transferred and assigned to this plaintiff under the bill of sale in this complaint hereinabove mentioned and now in the possession of the plaintiff.

5th. For costs and disbursements herein.

McCLURE & McCLURE,

Attorneys for Plaintiff.

State of Washington,

County of King,—ss.

John C. McCollister, being first duly sworn, on oath says: That he is manager of the Puget Sound Department of the United States Fidelity & Guaranty Company, a corporation, plaintiff in the above-entitled action, and makes this affidavit by way of verification of the foregoing complaint for the reason that plaintiff is a corporation and he is its manager as aforesaid; that he has read said complaint, knows the contents thereof, and believes the same to be true.

JOHN C. MCCOLLISTER.

Subscribed and sworn to before me this 11th day of March, A. D. 1921.

WALTER A. McCLURE,

Notary Public in and for the State of Washington,
Residing at Seattle. [42]

EXHIBIT "A."

CONTRACT.

THIS AGREEMENT, made and entered into this 21st day of July, 1919, between the STATE OF WASHINGTON, acting through the State Highway Board, under and by virtue of Chapter 186 of the Laws of 1909, and Puget Sound Engineering

Company, a corporation existing under and by virtue of the laws of the State of Washington of Seattle, Washington, hereinafter called the Contractor, WITNESSETH: That in consideration of the payment, covenants and agreements, hereinafter mentioned, to be made and performed by the parties hereto, the parties hereto covenant and agree as follows:

I. The Contractor shall do all work, furnish all material for grading, draining and paving with concrete, a portion of the Pacific Highway between Salmon Creek and Pioneer (Permanent Highway No. 2-B), in Clarke County, Washington, Post Road Project, No. 34, between Station 257+30.6 and Station 606+60, in accordance with and as described in the attached Plans, General Stipulations and Specifications, which are hereby a part hereof, and shall have the same effect as though the same were fully inserted herein, and in full compliance with the terms, conditions and stipulations herein set forth, and shall perform any extra work which may be ordered as herein provided.

II. The Contractor shall provide and be at the expense of all materials, labor, carriage, tools, implements and conveniences and things of every description that may be requisite for the transfer of materials and for constructing and completing the work above described.

III. It is understood and agreed by and between the parties hereto that the work included in this contract is to be done under the direct supervision and to the complete satisfaction of the State High-

way Commissioner, subject to inspection at all times and approval by the United States Secretary of Agriculture, or his agents, and in accordance with the laws of the State of Washington and the rules and regulations of the said Secretary of Agriculture made pursuant to that certain act of Congress approved July 11, 1916 (39 U. S. Statutes at Large, 355), entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes." It is also understood and agreed that such additional drawings and explanations as may be necessary to detail and illustrate the work, are to be furnished by the State Highway Commissioner, and the Contractor agrees to conform to and abide by the same, as far as may be consistent with the purpose and intent of the original drawings and specifications.

IV. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, the State Highway Commissioner shall be at liberty, after three (3) days' written notice to the Contractor, to provide any such labor or materials and deduct the cost thereof from any moneys then due or thereafter become due to the Contractor under this contract; and if the State Highway Commissioner shall consider that such refusal, neglect or failure is sufficient ground for such action, he may, by written notice to the Contractor and to his Surety or its representa-

tive, terminate the employment of the Contractor for said work, and enter upon the premises and take possession of all materials, tools, and appliances thereon, for the purpose of completing the work included under this contract, and employ, by contract or otherwise, any person or persons to finish the work, and provide the materials therefor; and in case of such discontinuance of the employment of the Contractor, he shall not be entitled to receive any further balance of the amount to be paid under this contract until the work shall be fully finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the State Highway Commissioner in finishing the work, such excess shall be paid by the State to the Contractor, but if such expense shall exceed unpaid balance, the Contractor shall pay the difference to the State Treasurer.

V. The Contractor hereby agrees to commence the work called for under this agreement within ten (10) days from date hereof, and to complete all the work called for under this agreement, in all parts and requirements before the 1st day of July, 1920. The State hereby reserves the right to accept and make use of any portion of said work before the completion of the entire work without invalidating the contract, or binding itself to accept the remainder of the work, or any portion thereof, whether completed or not.

VI. Time shall be of the essence of this contract on the part of the Contractor, and in case the Contractor shall fail in the due performance of the con-

tract by and at the time herein mentioned, or by and at such other time to which the period of completion may have been extended, he shall be liable to pay to the State of Washington as and for liquidated damages, and not as penalty, the cost of engineering and inspection which shall not exceed the sum of Twenty-five (\$25.00) Dollars for each and every day which may elapse between the appointed and actual time of completion, which said sum is hereby agreed upon, fixed and determined as the damage that will be suffered by such failure to complete the work within the time named; and the State Highway Commissioner may deduct the same from the amount due or to become due to the Contractor, and such payments or deductions shall not in any degree release the Contractor from the further obligations and penalties in respect to the fulfillment of the entire contract, nor any right which the State may have to claim, sue for and recover compensation and damages for nonperformance of this contract.

VII. Payments shall be made for work and labor performed and materials furnished under this contract according to the schedule of rates and prices hereto attached and made a part hereof, and in no other manner whatsoever. The State Highway Commissioner shall determine the unit quantities and proper classification of all work done and materials furnished under the provisions of this agreement, and his determination thereof shall be final and conclusive and binding upon the Contractor.

Partial payments under this contract, not to exceed eighty per cent (80%) of the work done, shall be made at the request of the Contractor once each month, said payments to be made upon estimates of the State Highway Commissioner. Final payments for said work shall be made within thirty (30) days of the final completion and acceptance of the entire work by the State Highway Commissioner, PROVIDED, that before the making of such final payment the Contractor shall show to the satisfaction of the State Highway Commissioner that all just debts due all laborers, mechanics, material men, and persons who have supplied such Contractor, or sub-contractor, with materials or goods of any kind for this work, have been paid, and PROVIDED FURTHER, that if prior to any payment being made the State Highway Commissioner receives notice from any person or persons that any laborers, mechanics or materialmen, or other persons who have furnished or supplied said Contractor, or any sub-contractor, with any labor, service, material, goods or provisions, of any kind, in connection with the construction of said portion of the Pacific Highway that may be ordered for said portion of the Pacific Highway have claims against the Contractor, or any sub-contractor, for any such service or things, for which any such [43] laborers, mechanics, materialmen, or other persons, would be entitled to a lien under the laws of this State were said Highway not a public highway, or proper claim against the bond in such cases required by law, the State Highway Commissioner may, in his discretion, retain

out of the payments then due or to become due said Contractor, an amount, in addition to the twenty per cent (20%) above provided to be retained until the final completion of said work, sufficient to cover all such claim or claims of which notice shall have been so given, until such claim or claims shall have been fully satisfied and paid and receipts in full for the same shall have been furnished by said Contractor to the State Highway Commissioner, and the said Contractor hereby expressly agrees to pay all such claims.

VIII. Payments under this contract, to the extent of at least fifty (50%) per centum thereof, shall be made in the following manner upon presentation of proper vouchers by the Contractor, said vouchers to be approved by the State Highway Commissioner acting for the State and for Clarke County under the resolution of its Board of County Commissioners:

a. By the State Treasurer from the Motor Vehicle Fund upon warrants of the State Auditor.

b. By the State Treasurer from the Permanent Highway Fund to the credit of said County upon warrants of the State Auditor. No warrant, however, can be issued for any purpose against the Permanent Highway Fund unless there be sufficient money to pay such warrant in such fund to the credit of said county.

c. By the Treasurer of said County from the Interstate Bridge Fund of said County upon warrants of the County Auditor.

d. By the Treasurer of said County from the

Road and Bridge Fund and Road District Fund of said County upon warrants of the County Auditor.

The remaining payments under this contract, not exceeding fifty (50) per centum thereof, shall be made by the State Treasurer as the officer designated and authorized to receive and disburse the share of the United States payable under the Federal Aid Road Act on account of this project, the same having been set aside by the Secretary of the Treasury for said purpose on certificate of the Secretary of Agriculture of his approval of the plans, specifications and estimates. Payment of the share of the United States, payable under the Federal Aid Road Act on account of this project, may be made from the Public Highway Revolving Fund.

Such Federal Aid payments shall be made on warrants drawn by the Secretary of Agriculture, paid by the Secretary of the Treasury to the State Treasurer, and by him applied in reimbursement of the State fund from which advance payments have been made to the Contractor for the share of the United States, payable under the Federal Aid Road Act on account of this project, or for disbursement direct to the Contractor on presentation of proper vouchers approved by the State Highway Commissioner.

IX. Any alterations deemed necessary by the State Highway Commissioner may be made in the work shown and described in the drawings and specifications, but only upon the written order of said Highway Commissioner or his authorized representative, and when so made the value of the work so added or omitted shall be computed by the State

Highway Commissioner, and the amount so certified shall be final and conclusive, and binding upon the Contractor, and shall be added to or deducted from the contract price. The schedule of unit or itemized prices hereto attached is intended to form a part of this contract, and shall constitute as far as possible the basis upon which the value of all work added or omitted shall be computed.

X. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the State Highway Commissioner or his authorized representative. The said Contractor shall furnish the State Highway Commissioner or his authorized representative, without charge, samples of materials used in construction as said samples may be required, in order that the character of such material may be determined.

Defective work or material may be condemned by the State Highway Commissioner any time before the final acceptance of the work. Notice of such condemnation shall be given in writing by the State Highway Commissioner; such condemned work shall be immediately taken down or changed. Defective material shall be immediately removed or disposed of to the satisfaction of the State Highway Commissioner. Failure or neglect on the part of the State Highway Commissioner to condemn unsatisfactory material or reject inferior workmanship shall in no way release the Contractor, nor shall it be construed to mean the acceptance of such work, nor shall the final acceptance bar the State

of Washington from recovering damages in case fraud was practiced.

Time lost in replacing such improper work shall furnish no ground to the Contractor for claiming an extension of time for the completion of the work.

Incompetent, careless or negligent employees shall be forthwith discharged by the Contractor upon the written request of the State Highway Commissioner, or his authorized representative, and failure to comply with such request shall be sufficient grounds for the termination of the contract, as provided for in this article or Article IV hereof.

XI. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper material which may appear before the time of final payment and release.

XII. The work and material for such improvement shall be at the sole risk of the Contractor until the same shall have been fully accepted by the State Highway Commissioner, and any damage or loss that may occur or result to the same prior to the final completion and acceptance of said improvement including any extra work that may be ordered by the State Highway Commissioner, shall fall upon and be made good by the said Contractor.

XIII. The Contractor shall not let, assign, or transfer this contract, or any interest therein, or

sub-let the work herein provided to be done, or any part thereof, without the consent, in writing, of the State Highway Commissioner. The Contractor shall file with the State Highway Commissioner a duplicate of all sub-contracts made by him as aforesaid.

The Contractor shall give his personal attention to the work at all times, and shall be present, either in person or by duly authorized representative, on the site of the work continually during its progress, and shall receive instructions from the State Highway Commissioner. Any sub-contractor shall be considered the agent of the Contractor, and the latter shall be responsible for any indebtedness incurred by such agent. If any sub-contractor fails to perform his work in a satisfactory manner, his sub-contract may be terminated by the State Highway Commissioner.

XIV. The Contractor shall be liable for all damages and injury which shall be caused, or which shall occur to any person or persons or property whatsoever, by reason of any negligence of said Contractor, or any of his servants, employees, or sub-contractors, or by reason of any breach or violation of any of the provisions of this agreement, or any of his duties or obligations thereunder. The Contractor shall also assume all liabilities for and protect the State of Washington from any damages or claims arising from the use of any pretended articles or devices in any part of the work. [44]

It is mutually agreed between the parties hereto that any payments or contributions due or required by Chapter 74 of the Laws of 1911 (Industrial In-

Insurance Act) from the State of Washington covered by this contract may be deducted by the State from any payment or payments made to the Contractor herein, and that the sum or sums so deducted shall be determined each month upon the basis of the work of said month, and shall be made upon the proper written order and demand of the Industrial Insurance Commission, a notice of which order and demand shall be served upon the said Contractor prior to said deduction. It is further agreed that the Contractor herein, or any sub-contractor or contractors employed by them, shall be subject to the provisions of said act as provided and required in Section 17 thereof.

XV. It is part of the public policy of the State of Washington that all work by contract or day labor done for it, or any political subdivision created by its law, shall be performed in the work days of not more than eight (8) hours each, except in case of extraordinary emergencies. No case of extraordinary emergency shall be construed to exist in any case where other labor can be found to take the place of the labor which has already been employed for eight (8) hours in any calendar day. In case of the violation of the provision of this article, the State Highway Commissioner shall have the right to cancel this contract by written notice to the Contractor and to his Surety or his representative, and shall have the right to complete the work in the manner provided in Article IV hereof.

In the employment of labor in the performance of this contract, preference shall be given, other con-

ditions being equal, to honorably discharged soldiers, sailors and marines, but no other preference or discrimination among citizens of the United States shall be made.

XVI. The Contractor agrees to execute and furnish to the State of Washington a good and sufficient bond with an approved surety company as surety, said bond to be payable to the State of Washington, and be in the penal sum of the full amount of the Contract, conditioned that he shall faithfully perform all the provisions of this contract, and further conditioned as required by law for the payment of all laborers, mechanics, sub-contractors and materialmen, and all persons who shall supply such person or persons or sub-contractors with provisions or supplies for the carrying on of such work. If the State Highway Commissioner shall have reason to believe that the security on said bond has become impaired since the execution thereof, or is insufficient, he may require the Contractor to furnish other or additional security.

XVII. The State of Washington hereby promises and agrees with the Contractor to employ, and does employ him to provide the materials and to do and cause to be done the work of grading, draining, and paving with concrete a portion of the Pacific Highway between Salmon Creek and Pioneer, (Permanent Highway No. 2-B) in Clarke County, Washington, Post Road Project No. 34, between Station 257+30.6 and station 606+60. To complete and finish the same according to the drawings and specifications and the terms and conditions herein

contained and referred to, in accordance with the schedule of unit or itemized prices hereto attached and made a part hereof, and further agrees to employ him to perform any extra work that may be ordered, as provided in Section 21 of the Specifications, at the actual cost, plus ten per cent (10%), which cost shall not include overhead expense or the use of equipment, and hereby contracts to pay the sums stipulated at the time and in the manner and upon the conditions above set forth.

The Contractor for himself, and for his heirs, successors, executors, administrators and assigns, does hereby agree to the full performance of all the covenants herein contained upon his part.

XVIII. It is further provided that no liability shall attach to the State by reason of entering into this contract, except as especially provided herein.

IN WITNESS WHEREOF, the said Contractor has hereunto set his hand and seal, and the said State Highway Board of Washington has pursuant to resolutions duly adopted, caused these presents to be subscribed by its Chairman and Secretary, and the name of the Board to be hereunto affixed the day and year first above written.

PUGET SOUND ENGINEERING CO.,

W. H. BORROW, Pres.,

L. P. BANKSON, Sec.,

Contractor.

STATE HIGHWAY BOARD OF WASHINGTON,

By LOUIS F. HART, Chairman.

By JAMES ALLEN, Secretary.

GENERAL STIPULATIONS.

It will further be expressly agreed between the parties to the contract that the contract is made subject to the following conditions and stipulations:

a. It is understood that intending bidders have examined the work covered by these plans and specifications and have satisfied themselves as to the nature and intent of the work to be done; contract and specifications to be strictly enforced in order to obtain a finished and workmanlike job.

In case of ambiguity of expression in the specifications, or doubt as to the correct interpretation of the same, the matter shall be submitted to the Highway Commissioner, whose decision shall be final.

b. Any work or materials that may have been accidentally omitted in the description of the work, but which is clearly implied, shall be furnished by the contractor the same as if it had been specifically stated. Work shown on the plans and not mentioned in the specifications, and *vice versa*, will be done as if shown by both, when and where required.

c. Wherever the word "engineer" is used it refers to the Highway Commissioner, his chief engineer or authorized assistants, by whom all explanations and directions necessary for the satisfactory prosecution and completion of the work described in these specifications will be given.

d. Wherever the word "contractor" is used it refers to and means the party or parties who shall have duly entered into contract with the State of

Washington to perform the work; their duly authorized agents or legal representatives.

e. Any written notice to the contractor which may be requisite under these specifications may be served on said contractor either, personally or by mail or by leaving the same at his last known place of residence. [45]

f. All engineer's marks, monuments, or stakes shall be carefully preserved without disturbance until permission for their removal shall be given by the engineer. All expense incurred through the resetting of stakes that have been destroyed by the contractor will be charged to the contractor and deducted from his estimates.

g. No deviation from the specifications or detailed plans will be allowed, unless a written permission shall have been previously obtained from the Highway Commissioner.

h. The Highway Commissioner, during the progress of the work, may, by giving written notice to the contractors, alter any of the details of construction in any manner that may be found expedient or suitable; such alterations shall not invalidate the contract, and the contractor must accept and execute the same as if they were part of the original contract and at the completion of the work an allowance will be made for such alterations, etc., either for or against the contractor as the case may be, and the value of such alterations will be estimated by the engineer from the schedule of rates and prices attached to the contract, or

should it not apply, the equitable amount will be estimated by the engineer.

i. It is mutually agreed between the parties to the contract, that to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in these specifications, or their performance by either of said parties, the Highway Commissioner shall be an umpire to decide all matters arising or growing out of said contract between them.

j. The contractor will be held responsible for the faithful execution of the work in accordance with the specifications. Any defective work that may be discovered by the engineer or his appointees before the final acceptance, or before final payment shall have been made, shall be removed and replaced by work and materials which shall conform to the spirit of the specifications; the fact that the inspector or other person in charge may have overlooked such defective work shall not constitute an acceptance of the same.

k. All work, including shoulders, ditches and slopes, shall be neatly dressed and cleaned up on completion according to the engineer's direction, and be left in a neat and orderly condition, ready for use.

l. The successful bidder shall satisfy the Highway Commissioner before the contract is awarded to him, that he has or will promptly provide suitable and proper men and tools and machinery for each of the different kinds of work.

m. The contractor shall, for the same compensa-

tion as for other grading, grade a safe, proper and workmanlike connection with all intersecting public or private roads or driveways, according to the directions of the engineer.

n. All material and workmanship shall be of the best of its kind or class. All material which may be rejected shall at once be removed from the vicinity and replaced by material of approved quality.

o. The contractor shall give his personal attention to the faithful prosecution of the work, shall not sublet the same or any part thereof without the written consent of the Highway Commissioner. Copies of all sub-contracts must be filed with the Highway Commissioner. Contractor shall not assign, by power of attorney or otherwise, any of the moneys payable under these specifications.

p. Whenever the contractor is not present on the work, orders will be given to the superintendent or overseer who may have immediate charge thereof, and shall by him be received and obeyed. If any person employed on the work shall appear to be incompetent, disorderly or unfaithful, he shall upon requisition of the engineer, be at once discharged and not again employed upon any part of the work.

q. The Highway Commissioner may suspend all work on any or all portion of the road for such periods as he may deem necessary. The contractor shall not make any claim or demand for damage by reason of such suspensions in the work, but the period of such suspension will be excluded in com-

puting the time limit for the completion of the work.

r. The contractor agrees to assume all risks and liabilities for accidents or damage that may accrue to persons or property during the prosecution of the work under these specifications, by reason of the negligence or carelessness of himself, his agents or employees.

s. All work will be measured and paid for as set forth in the attached form of bids.

t. No bid will be considered unless prices be given for each item in proposal blank.

u. The preliminary estimates, the plans, and the grade and alinement as staked on the ground or shown on profiles and maps, are intended to represent the work to be done with reasonable closeness, but the contract is not for any specific number of units of any kind, nor for any specific grade line or alinement.

v. Where the improvement follows an existing traveled road the contractor shall at his own expense keep the road open to traffic or provide suitable detours so that traffic will not be interrupted.

w. The bidders' attention is particularly called to sections one and two of the specifications and also to section three, Chapter 33 of the Session Laws of 1917, with reference to the burning of refuse, timber, brush and debris from clearing and grubbing operations.

The Highway Board, the Washington Forest Fire Association and the State Fire Warden all insist that the statutes covering the matter be strictly en-

forced, and that the refuse from clearing and grubbing on public roads be properly disposed of and the premises be left in a neat and presentable condition.

The provisions of the specifications and the statutes, therefore, will be strictly enforced.

x. **FEDERAL PARTICIPATION:** The attention of the bidder is invited to the fact that pursuant to the provisions of that certain Act of Congress, approved July 11, 1916 (39 Sta. 355), entitled, "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," the United States Government is to pay a portion of the cost of this improvement. The above Act of Congress provides that the construction work and labor in each state shall be done in accordance with its laws and under the direct supervision of the State Highway Department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant thereto. The construction work, therefore, will be subject to such inspection by the United States Secretary of Agriculture, or his agents, as may be necessary to meet the above requirements, but such inspection will in no sense make the Federal Government a party to this contract and will in no way interfere with the rights of either party hereunder, nor will it subject the contractor to compliance with the Federal laws relative to labor, etc., on Government contracts. [46]

PROPOSAL.

To the State Highway Board, Olympia, Washington.

Gentlemen:

The undersigned hereby certify that they have examined the location of the Pacific Highway, Salmon Creek to Pioneer, in Clarke County, Station 257+-30.6 to Station 606+60 and have read and thoroughly understand the plans, specifications and contract governing the work embraced in this improvement, and the method by which payment will be made for said work, and hereby propose to undertake and complete the work embraced in this improvement, or as much thereof as can be completed with the money available, in accordance with the said plans, specifications and contract and the following schedule of rates and prices:

Common Excavation, including

haul of 400 feet..... Per Cu. Yd. .80

Subgrade Excavation, including

haul of 400 Ft..... Per Cu. Yd. .90

Overhaul on any of the above

materials per each 100 Ft. Per Cu. Yd. .04

Preparation of Subgrade..... Per Sq. Yd. .06

One Course Cement Concrete

Pavement in place..... Per Sq. Yd. 2.39½

Pavement Reinforcing in place Per Sq. Yd. .05

Pavement Header Design No.

1, in place..... Per Lin. Ft. 1.00

Pavement Header Design No.

2, in place..... Per Lin. Ft. .80

Reinforced Concrete Gutter in

place Per Lin. Ft. 1.00

Tile Drain in place 6" dia. Per Lin. Ft. .50

Guard Rail in place including

spikes and bolts. Per Lin. Ft. 1.25

Attached hereto is certified check for Twelve Thousand Five Hundred Dollars (\$12,500.00), payable to the State Treasurer of Washington, this amount being five per cent (5%) of the total bid, based upon the approximate estimate of quantities at the above prices.

Dated at Olympia, Washington, this 14th day of July, 1919.

PUGET SOUND ENGINEERING CO.

By W. H. BORROW,

Prest.

Address of Bidder:

(Principal place of business)

611-612 Mutual Life Bldg.,

Seattle, Wn. [47]

EXHIBIT "B."

KNOW ALL MEN BY THESE PRESENTS, that Puget Sound Engineering Company, a corporation, existing under and by virtue of the laws of the State of Washington, of Seattle, Washington, as Principal, and United States Fidelity & Guaranty Company, as surety, are jointly and severally held and bound unto the State of Washington, in the penal sum of Two Hundred Five Thousand Four Hundred Eighty-five and 31/100 Dollars (\$205,485.-31), for the payment of which we jointly and sev-

erally bind ourselves, our heirs, executors, administrators and assigns and successors and assigns, firmly by these presents.

THE CONDITION of this bond is such that, WHEREAS, on the 21st day of July, A. D. 1919, the said Puget Sound Engineering Company, Principal herein, made and entered into a certain contract with the State of Washington, by the terms, conditions and provisions of which contract the said Puget Sound Engineering Company, Principal herein, agrees to furnish all material and do certain work, to wit: That it will undertake and complete the construction of a portion of the Pacific Highway between Salmon Creek and Pioneer (Permanent Highway No. 2-B), in Clarke County, Washington, Post Road Project No. 34, between Station 257 plus 30.6 and Station 606 plus 60, as per maps, plans and specifications made a part of said contract;

NOW, THEREFORE, if the principal herein shall faithfully and truly observe and comply with the terms, conditions and provisions of the said contract in all respects, and shall well and truly and fully do and perform all matters and things by it undertaken to be performed under said contract, upon the terms proposed therein, and within the time prescribed therein, and shall indemnify the State of Washington against any direct or indirect damages that shall be suffered or claimed, for injuries to persons or property during the construction and improvement of such highway, and until the same is accepted, and shall pay all laborers,

mechanics, sub-contractors and materialmen, and all persons who shall supply such contractor or sub-contractors with provisions and supplies for the carrying on of such work, and shall in all respects faithfully perform said contract according to law, then this obligation to be void, otherwise to remain in full force and effect.

WITNESS our hands this 21st day of July, 1919.
PUGET SOUND ENGINEERING COMPANY.

(Seal) W. H. BORROW, President,
L. C. BANKSON, Secretary,
Principal.

UNITED STATES FIDELITY AND
GUARANTY CO.

(Seal) By D. H. McCOLLISTER,
Attorney-in-fact,
Surety.

Address of local office and agent of Surety Company: PUGET SOUND DEPT., 702-5 Hoge Bldg., Tel. Elliott 958.

JOHN C. McCOLLISTER,
Manager.

C. H. CAMPBELL,
Assistant Manager.

Approved as to form, July 23, 1919.

JNO. A. HOMER,
Assistant Attorney General.

Approved as to execution by surety and statement of capital and surplus, July 22, 1919.

J. O. RUMMENS,
Deputy Insurance Commissioner.

Approved July 28, 1919.

(Seal)

LOUIS F. HART,

Acting Governor. [48]

Exhibit "B."

In the Superior Court of the State of Washington
for the County of Thurston.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner;
C. W. CLAUSEN, as State Auditor; CLIF-
FORD L. BABCOCK, as State Treasurer;
C. W. RYAN, as Trustee in Bankruptcy of
PUGET SOUND ENGINEERING COM-
PANY, a Corporation; A. N. ALLEN, Sole
Trader, Doing Business Under the Trade
Name of ALLEN GARAGE; ALLEN &
LEWIS, a Corporation; C. B. BRALEY
and L. B. CUSICK, Partners Doing Business
Under the Firm Name of BRALEY & CU-
SICK; J. G. BENNETT, Sole Trader, Doing
Business Under the Trade Name of BEN-
NETT HARDWARE COMPANY; M.
BARDE & SONS, INC., a Corporation; L.
J. BROCK; CLYDE EQUIPMENT COM-
PANY, a Corporation; J. W. CRAMER, Sole
Trader, Doing Business Under the Trade
Name of MAPLEWOOD DAIRY FARM;

F. T. CROWE & CO., a Corporation; COAST STEEL & MACHINERY CO., a Corporation; CONTRACTORS' MACHINERY & STORAGE CO., a Corporation; P. A. CHRISTENSON, and LLOYD A. CHRISTENSON, Partners, Doing Business Under the Firm Name of CHRISTENSON & SON; E. G. DITLEVSEN, Sole Trader, Doing Business Under the Trade Name of SANITARY MEAT MARKET; GEORGE L. DuBOIS, W. B. DuBOIS, and JOS. J. DONOVAN, Partners, Doing Business Under the Firm Name of DuBOIS MILL COMPANY; DANVILLE CO., a Corporation; CHARLES DAHL and L. PENNE, Partners, Doing Business Under the Firm Name of DAHL & PENNE; F. L. EVANS; I. N. FLEISCHNER, M. FLEISCHNER, M. A. MAYER, SAM SIMON, JOSEPHINE HIRSCH, SANFORD HIRSCH and NATHAN STRAUSS, Partners, Doing Business Under the Firm Name of FLEISCHNER, MAYER & CO.; FEENAUGHTY MACHINERY CO., a Corporation; FULLINWIDER MEAT COMPANY, a Corporation; GREELY'S FORD GARAGE, a Corporation; GREAT NORTHERN RAILWAY CO., a Corporation; GEORGE GODDARD, [49] ELIZABETH GODDARD, W. FOSTER HIDDEN and OLIVER M. HIDDEN, Partners, Doing Business Under the Firm Name of HIDDEN BROS.; HONEY-

MAN HARDWARE CO., a Corporation;
H. E. JOHNSON; J. P. LEE; A. B. Mc
COY, Sole Trader, Doing Business Under
the Trade Name of McCOY AUTO CO.;
MARSHALL-WELLS COMPANY, a Cor-
poration; J. M. MURPHY and B. C.
THOMPSON, Partners, Doing Business
Under the Firm Name of MURPHY &
THOMPSON; MITCHELL, LEWIS & STA-
VER, a Corporation; MEESE & GOTT-
FRIED COMPANY, a Corporation;
NIKUM & KELLY SAND & GRAVEL
CO., a Corporation; NORTHERN PACIFIC
RAILWAY CO., a Corporation; PACIFIC
DERRICK & HOIST CO., a Corpora-
tion; R. H. O'NIELL, C. L. PECK and
B. McCORMACK, Partners, Doing Business
Under the Firm Name of PECK-O'NIELL
LUMBER CO.; PORTLAND MACHIN-
ERY CO., a Corporation; RIDGEFIELD
STATE BANK, a Corporation; JOHN A.
ROEBLING SONS CO. of California, a Cor-
poration; L. CLAY SPARKS, M. RENIE
SPARKS and HARRY W. SPARKS, Part-
ners, Doing Business Under the Firm Name
of SPARKS HARDWARE CO.; L. CLAY
SPARKS, M. RENIE SPARKS and
HARRY W. SPARKS, Partners, Doing
Business Under the Firm Name of SPARKS
AUTO SUPPLY CO.; JOHN A. SAUER-
MAN, Sole Trader, Doing Business Under
the Firm Name of SAUERMAN BROS.; V.
U. HERMAN, Sole Trader, Doing Business

Under the Firm Name of SALMON CREEK GARAGE; STANDARD OIL CO., a Corporation; WILLIAM TENNY; UNION BRIDGE CO., a Corporation; LEWIS SHATTUCK and E. E. SLERET, Partners, Doing Business Under the Firm Name of UNIVERSAL AUTO CO.; UNITED STATES RUBBER COMPANY, a Corporation; UNION NATIONAL BANK OF SEATTLE, a Corporation; UNION OIL COMPANY OF CALIFORNIA, a Corporation; VANCOUVER NATIONAL BANK, a Corporation; WEBBER MACHINE WORKS, a Corporation; THE WESTERN SALES CO., INC., a Corporation; WINTERS & BROOKINGS, a Corporation; HARRY WOLFE; ZIMMERMAN-WELLS-BROWN CO., a Corporation,
Defendants.

**ANSWER OF C. W. RYAN, AS TRUSTEE IN
BANKRUPTCY OF PUGET SOUND ENGI-
NEERING COMPANY, A CORPORATION.**

Comes now defendant, C. W. Ryan, as trustee in bankruptcy, of Puget Sound Engineering Company, a corporation, and in answer to the complaint filed in the above-entitled court and cause by plaintiff, United States Fidelity & Guaranty Company, a corporation, admits, denies and alleges as follows:

I.

Admits allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, and XVIII of said complaint.

II.

Has not sufficient information or knowledge upon which to form a belief as to the truth or falsity of the allegations of Paragraphs XII, XV and XVI of said complaint, and therefore denies each, all and every of the allegations of said paragraphs.

III.

Denies each, all and every of the allegations of Paragraphs XVII and XX of said complaint.

IV.

Admits the following allegations of Paragraph XIII of said complaint: That plaintiff, upon investigation, discovered that [50] said Puget Sound Engineering Company was in default in payment of claims of laborers for work and labor performed upon said contract and in payment of claims for materials and supplies, but has not sufficient information or knowledge on which to form a belief as to the other allegations of said Paragraph XIII, and, therefore, denies each, all and every of the other allegations of said paragraph.

V.

Denies the allegations of Paragraph XIV of said complaint, except as is hereinafter admitted or qualified in the separate answer and cross-complaint of defendant.

VI.

Admits the following allegations of Paragraph XIX of said complaint: That the defendant C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, claims to have some interest in or claim to the amount retained

by the State of Washington, but denies each, all and every other allegation of said Paragraph XIX.

And for a further and separate answer and defense, counterclaim and cross-complaint to the complaint filed herein by plaintiff, defendant alleges and says:

I.

That at all the times herein mentioned plaintiff was and now is a corporation, organized and existing under the laws of the State of Maryland, and was and is authorized and empowered by its articles of incorporation and the laws of said State of Maryland to do a general surety business, and was and is qualified to do business in the State of Washington as a surety company.

II.

That at all the times herein mentioned the Puget Sound Engineering Company was and now is a corporation, organized and existing under the laws of the State of Washington, with its principal [51] office at Seattle, King County, in said state, and that on the 16th day of December, 1920, it was duly adjudicated bankrupt by order on said day entered by the District Court of the United States for the Western District of Washington, Northern Division, in Cause Number 6460 on the records of said court, upon an involuntary petition filed in said court and cause on the 22d day of November, 1920, and that said bankruptcy cause was on the 16th day of December, 1920, referred by said United States District Court to the Honorable C. R. Hawkins, Referee at Seattle, for further proceedings and

administration, as provided by law; that on the first day of February, 1921, at the first meeting of creditors of said bankrupt corporation, held after due notice, before said referee in bankruptcy, the defendant herein, C. W. Ryan, was duly appointed trustee in bankruptcy of said bankrupt estate, and thereupon duly qualified as such trustee by filing the requisite bond, which bond has been duly accepted and approved, and that said C. W. Ryan is the duly elected, regularly qualified and acting trustee of said bankrupt.

III.

That by virtue of the provisions of the acts of Congress relating to bankruptcy, defendant, as trustee in bankruptcy of said Puget Sound Engineering Company, became vested with the title to all the property of said bankrupt of whatsoever kind or character, nature and description as of the date of the filing of said petition in bankruptcy, and said defendant also became entitled to all the right of action which the said creditors of said bankrupt had at the time of said filing of said petition to avoid all transfers made by said Puget Sound Engineering Company and to recover said property so transferred or its value, and said defendant, as trustee, became further entitled to recover property, or its value, transferred by said Puget Sound Engineering Company in fraud of its creditors as well as all property, [52] or its value, transferred by said Puget Sound Engineering Company within four months prior to the filing of said petition in bankruptcy if the effect of such transfer

was to enable the transferees to obtain a greater percentage of its or their claim than any other creditors of the same class, and the person or persons receiving same or to be benefited thereby, or their agents acting therein, shall have had reasonable cause to believe that said transfer or transfers would effect a preference under said Bankruptcy Act.

IV.

That on the 25th day of September, 1920, and for a long time prior thereto, the said Puget Sound Engineering Company was insolvent.

V.

That while insolvent, to wit, on the 25th day of September, 1920, the said Puget Sound Engineering Company, made, executed and delivered to the said plaintiff, United States Fidelity & Guaranty Company, two certain instruments intended to effect a transfer, and the effect of which did transfer the property therein particularly mentioned and described, a copy of which instruments are hereto annexed, marked Exhibit "A" and Exhibit "B," and prayed to be read as a part hereof, as completely and as fully as though here and now set forth in full.

VI.

That said property mentioned in said instruments of transfer was taken possession of by said plaintiff herein on or about the said 25th day of September, 1920, and other property of said Puget Sound Engineering Company, not mentioned and described in said bills of sale, was then also taken

possession of by said plaintiff, the exact description, quality, kind and character of which is not in the information and knowledge of the defendant herein, except that among said property not mentioned in said bills of sale was a quantity of cement, lumber, expansion joints and other material, the value of [53] which likewise is not in the information or knowledge of the defendant, but which defendant believes and therefore alleges was and is in excess of Twenty Thousand and No/100 (\$20,000.00) Dollars, nor has the defendant sufficient information or knowledge concerning the value of the property mentioned, described and set forth in the bills of sale referred to herein and attached hereto, which property was taken possession of by the said plaintiff, as heretofore set forth, but defendant believes, and therefore alleges, that the value of said property so taken possession of and so described in said bills of sale was and is in excess of Twenty Thousand and No/100 (\$20,000.00) Dollars.

VII.

That said property transferred and delivered to said plaintiff herein on the 25th day of September, 1920, by said Puget Sound Engineering Company was transferred for the purpose of securing and indemnifying the said plaintiff against the liability and obligation of its suretyship upon a certain bond executed by the Puget Sound Engineering Company as principal and the said United States Fidelity & Guaranty Company, plaintiff, as surety, on the 21st day of July, 1919, payable to the State of

Washington in the penal sum of Two Hundred Five Thousand Four Hundred Eighty-five and 31/100 (\$205,485.31) Dollars, said bond being set forth as Exhibit "B," attached to plaintiff's complaint, reference to which is here and now made, and which is prayed to be read as a part hereof as fully as though the same were now and here set forth in full.

VIII.

That the liability and obligation of said plaintiff as surety upon said bond, referred to in the preceding paragraph, had already been incurred and the transfers to said plaintiff by said Puget Sound Engineering Company were in payment of or as security for the payment of an antecedent obligation, and not for a present consideration, and that said transfers of said property mentioned herein, as aforesaid, were made within four months of the filing of the petition in bankruptcy against said Puget Sound Engineering Company. [54]

IX.

That the said plaintiff, United States Fidelity & Guaranty Company, knew or had reasonable cause to believe that at the time of said transfers, to wit, on September 25, 1920, the said Puget Sound Engineering Company was insolvent, and said plaintiff knew or had reasonable cause to believe that the making, executing and delivery of said instruments of transfer and the transfer of said property, as aforesaid, would in effect enable the said plaintiff to receive a greater percentage of its debt than any other creditor or creditors of the said Puget

Sound Engineering Company of the same class, and that the said execution and delivery of said instruments and the said transfer of said property did enable the said defendants to receive a greater percentage of their debt than any other creditors of the same class and that by reason of the premises aforesaid, the said instruments of transfer and the said transfer of said property did effect a preference as aforesaid, and that the said transfer is therefore void as against this defendant.

X.

That on the 9th day of February, 1921, and on the 23d day of April, 1921, and at other times between said dates, the said defendant C. W. Ryan, as trustee in bankruptcy of said Puget Sound Engineering Company demanded from plaintiff the property set forth in paragraphs V and VI hereof, but the said plaintiff refused to return or turn over said property and still doth refuse.

XI.

That the assets of said estate in bankruptcy are insufficient to pay creditors in full.

XII.

That on the —— day of April, 1921, an order was duly made and entered by the referee in bankruptcy to whom the bankruptcy cause of said Puget Sound Engineering Company had been referred, directing the trustee herein to file this answer, counterclaim and cross-complaint. [55]

And for a second and further separate answer and defense, counterclaim and cross-complaint, defendant alleges and says:

I.

That at all the times herein mentioned plaintiff was and now is a corporation, organized and existing under the laws of the State of Maryland, and was and is authorized and empowered by its articles of incorporation and the laws of said State of Maryland to do a general surety business, and was and is qualified to do business in the State of Washington as a surety company.

II.

That at all the times herein mentioned the Puget Sound Engineering Company was and now is a corporation, organized and existing under the laws of the State of Washington, with its principal office at Seattle, King County, in said state, and that on the 16th day of December, 1920, it was duly adjudicated bankrupt by order on said day entered by the District Court of the United States for the Western District of Washington, Northern Division, in Cause Number 6460 on the records of said court, upon an involuntary petition filed in said court and cause on the 22d day of November, 1920, and that said bankruptcy cause was on the 16th day of December, 1920, referred by said United States District Court to the Honorable C. R. Hawkins, Referee at Seattle for further proceedings and administration, as provided by laws; that on the first day of February, 1921, at the first meeting of creditors of said bankrupt corporation, held after due notice, before said referee in bankruptcy, the defendant herein, C. W. Ryan, was duly appointed trustee in bankruptcy of said bankrupt estate, and

thereupon duly qualified as such trustee by filing the requisite bond, which bond has been duly accepted and approved, and that said C. W. Ryan is the duly elected, regularly qualified and acting trustee of said bankrupt. [56]

III.

That by virtue of the provisions of the Acts of Congress relating to bankruptcy, defendant, as trustee in bankruptcy of said Puget Sound Engineering Company, became vested with the title to all the property of said bankrupt of whatsoever kind or character, nature and description as of the date of the filing of said petition in bankruptcy, the said defendant also became entitled to all the rights of action which the said creditors of said bankrupt had at the time of said filing of said petition to avoid all transfers made by said Puget Sound Engineering Company and to recover said property so transferred or its value, the said defendant, as trustee, became further entitled to recover property, or its value, transferred by said Puget Sound Engineering Company in fraud of its creditors.

IV.

That amongst the property owned by the bankrupt at the date of the filing of the petition in bankruptcy against it was the right to receive certain moneys due it, but which were held and retained by the State of Washington by virtue of the terms of a compact entered into between the said Puget Sound Engineering Company and the State of Washington, through the State Highway Board

on or about the 21st day of July, 1919, referred to in Paragraph VII of plaintiff's complaint, which defendant is informed, and therefore alleges, amounted to the sum of Thirty-two Thousand Forty-six and 16/100 (\$32,046.16) Dollars.

V.

That the assets of said estate in bankruptcy are insufficient to pay creditors in full.

VI.

That by virtue of the Acts of Congress relating to bankruptcy, your defendant is entitled to said moneys retained by the State of Washington, as aforesaid. [57]

VII.

That on the — day of April, 1921, an order was duly made and entered by the referee in bankruptcy to whom the bankruptcy cause of said Puget Sound Engineering Company had been referred, directing the trustee herein to file this answer, counterclaim and cross-complaint.

WHEREFORE, defendant, C. W. Ryan, as Trustee in Bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, prays that a decree may be entered by this Court:

1. That the transfer by the Puget Sound Engineering Company of the plant, equipment and materials as alleged and set forth herein, be declared null, void, invalid and of no effect.

2. That an accounting be required of the plaintiff herein for the purpose of determining the value of the property received by it from the said Puget Sound Engineering Company, as herein alleged.

3. That upon said account being had that a judgment be awarded the defendant as against plaintiff in the amount of the value of said property transferred to it, as aforesaid, as ascertained by said accounting.

4. That defendant be determined to be entitled to moneys retained by the State of Washington, as herein set forth, in the amount of Thirty-two Thousand Forty-six and 16/100 (\$32,046.16) Dollars.

5. That defendant have his costs and expenses in this behalf expended.

6. Such other and further relief as to this Court may seem fit and proper.

SIDNEY TEISER,

McMASTER, HALL & SCHAFFER,

Attorneys for Defendant, C. W. Ryan, Trustee in
Bankruptcy of Puget Sound Engineering Com-
pany, a Corporation, Bankrupt. [58]

State of Washington,
County of Clarke,—ss.

I, C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, being first duly sworn, depose and say, that I am one of the defendants in the above-entitled action and that the facts contained in the foregoing answer are true as I verily believe.

C. W. RYAN.

Subscribed and sworn to before me this — day
of April, 1921.

Notary Public in and for the State of Washington,
Residing at Vancouver. [59]

Exhibit "C."

In the Superior Court of the State of Washington,
in and for the County of Thurston.

No. 7874.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner,
et al.,

Defendants.

PLAINTIFF'S REPLY TO ANSWER OF C. W.
RYAN AS TRUSTEE IN BANKRUPTCY.

The United States Fidelity & Guaranty Company, a corporation, plaintiff above named, replying to the answer of the defendant C. W. Ryan as trustee in bankruptcy of the Puget Sound Engineering Company, a corporation, verified May 5, 1921.

I.

Has no knowledge and therefore denies, each allegation of paragraph IV of said defendant's further and separate answer and defense, counterclaim and cross-complaint.

II.

Denies each allegation of paragraph V of said further and separate answer and defense, counter-claim and cross-complaint except that plaintiff admits that said instruments were executed and delivered September 25, 1920.

III.

Denies each allegation of paragraph VI of said further and separate answer and defense, counter-claim and cross-complaint except that plaintiff admits that September 25, 1920, the plaintiff entered upon and took possession of all the work under the highway contract of the Puget Sound Engineering Company mentioned in the complaint, and entered upon and took possession of the personal property of said Puget Sound Engineering Company located upon said highway as alleged [60] in the complaint, and denies that the value of said property then was, or now is, Twenty Thousand Dollars (\$20,000.00), or any other or greater sum than Forty-five Hundred Dollars (\$4500.00).

IV.

Denies each allegation of paragraph VII of said further and separate answer and defense, counter-claim and cross-complaint except as the matters therein referred to are set forth in the complaint herein, the allegations of which complaint are true.

V.

Denies each allegation of paragraph VIII of said further and separate answer and defense, counter-claim and cross-complaint except as said matters

appear in the complaint herein, the allegations of which complaint are true.

VI.

Denies each allegation of paragraphs IX and X of said further and separate answer and defense, counterclaim and cross-complaint.

VII.

Denies each allegation of paragraph IV of said defendant's second and further separate answer and defense, counterclaim and cross-complaint, and denies that the said Puget Sound Engineering Company owned at the date of the filing of said petition in bankruptcy, or had any interest in said sum of Thirty-two Thousand Forty-six and 16/100 (\$32,046.16) or any other sum except as set forth in the complaint herein.

VIII.

Denies each allegation of paragraph VI of said second and further separate answer and defense, counterclaim and cross-complaint.

WHEREFORE plaintiff demands judgment as in the complaint herein.

McCLURE & McCLURE,
Attorneys for Plaintiff. [61]

State of Washington,
County of King,—ss.

John C. McCollister, being first duly sworn, on oath says: That he is manager of the Puget Sound department of the United States Fidelity & Guaranty Company, a corporation, plaintiff in the above-entitled action, and makes this affidavit by way of

verification of the foregoing reply for the reason that plaintiff is a corporation and he is its manager as aforesaid; that he has read said reply, knows the contents thereof, and believes the same to be true.

JOHN C. McCOLLISTER.

Subscribed and sworn to before me this 16th day of May, A. D. 1921.

W. S. OSBORN,

Notary Public in and for the State of Washington,
Residing at Seattle. [62]

Exhibit "D."

In the Superior Court of the State of Washington
in and for the County of Thurston.

No. 7974.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Plaintiff,

vs.

JAMES ALLEN, as State Highway Commissioner,
C. W. CLAUSEN, as State Auditor, CLIF-
FORD L. BABCOCK, as State Treasurer,
C. W. RYAN, as Trustee in Bankruptcy of
Puget Sound Engineering Company, a Corpo-
ration, et al.,

Defendants.

NOTICE OF APPEAL.

To the Above-named Plaintiff and to McClure & McClure, Its Attorneys:

Please take notice that C. W. Ryan, as Trustee in bankruptcy for the Puget Sound Engineering Company, a corporation, one of the above-named defendants, hereby appeals from the judgment of the Superior Court of Thurston County, made and entered herein on the 21st day of November, 1921, in the above-entitled cause, as to paragraphs V and VI of said judgment, and from each and every part of said judgment and the whole thereof in so far as the same fails to give judgment in favor of this appealing defendant and against the plaintiff for the value of the equipment, material and supplies turned over by the Puget Sound Engineering Company to the plaintiff, as alleged in this defendant's answer and in accordance with the additional findings of fact proposed by this defendant herein.

Dated this 10th day of February, 1922.

SIDNEY TEISER,

McMASTER, HALL & SCHAEFER,

Attorneys for the Defendant, C. W. Ryan, as Trustee in Bankruptcy of Puget Sound Engineering Company, Bankrupt. [63]

Received copy of foregoing August 29, 1923.

McCLURE & McCLURE,

Attys. for Petitioner.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

138 *United States Fidelity & Guaranty Company*
Division. Aug. 30, 1923. F. M. Harshberger,
Clerk. By P. A. Page, Deputy. [64]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 6460.

In the Matter of the PUGET SOUND EN-
GINEERING COMPANY, a Corporation,
Bankrupt.

**Order upon Claim and Petition of the United States
Fidelity & Guaranty Co.**

The United States Fidelity & Guaranty Company, as Claimant and Petitioner, having heretofore, to wit, on August 22, 1923, filed herein its claim and petition wherein it prayed for certain relief therein mentioned, and upon which said claim and petition and order to show cause herein was issued directed to C. W. Ryan as trustee in bankruptcy of said bankrupt and restraining said C. W. Ryan as trustee from doing certain acts and things as is in said order to show cause specified.

And now, on this 30th day of August, 1923, the matter of said petition and the answer of the said C. W. Ryan as trustee thereto having come regularly on for hearing, the claimant and petitioner appearing by McClure & McClure, its attorneys, and C. W. Ryan as trustee appearing by Sidney Teiser his attorney, and the Court having heard and considered the parties respectively, being fully advised, it is by the Court ordered:

I.

That the petition of the United States Fidelity & Guaranty Company to set off its said claim against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in Bankruptcy and against said [65] United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand (\$22,000) Dollars and costs be, and the same is, hereby denied; to which order of the Court the said United States Fidelity & Guaranty Company excepts, and the exception is allowed.

II.

That the restraining order issued herein against the said C. W. Ryan as trustee be, and the same is, hereby dissolved; to which order of the Court the said United States Fidelity & Guaranty Company excepts, and the exception is allowed.

III.

That said C. W. Ryan, Trustee, be and he hereby is, directed to refrain from issuing execution upon said judgment of Twenty-two Thousand Dollars (\$22,000) and costs, rendered by the Superior Court of the State of Washington, for the County of Thurston, for a period of twenty days. This by the consent of counsel for trustee.

IV.

It is further ordered that the claim filed herein by said United States Fidelity & Guaranty Company on August 22, 1923, considered as a general claim, be referred to C. R. Hawkins, Referee in Bankruptcy at Seattle in said District, for further

proceedings as provided by law in the due administration of said estate in bankruptcy; to which order of the Court the said United States Fidelity & Guaranty Company excepts, and the exception is allowed.

Done in open court this 30th day of August, A. D., 1923.

FRANK S. DIETRICH,
Judge. [66]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 30, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [67]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND EN-
GINEERING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

Petition for Appeal.

To the Honorable Judges of the Above-entitled
Court.

The United States Fidelity & Guaranty Company,
a corporation, petitioner above named, feeling it-
self aggrieved by the order and decree made and

entered by the above-entitled court in the above-entitled cause, under date of August 30, 1923, wherein and whereby, among other things, it was and is ordered and decreed that the petition of the United States Fidelity & Guaranty Company to set off its claim as set out and proved in said petitioner's claim and petition, verified August 22, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against said United States Fidelity & Guaranty Company in the sum of Twenty-Two Thousand (\$22,000) Dollars and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved, and that said claim filed herein by said United States Fidelity & Guaranty Company be considered [68] as a general claim, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree, and particularly from the part thereof above specified, for the reasons set forth in the assignment of errors which is filed herewith, and the said petitioner prays that this, its petition for the said appeal may be allowed; that citation issue to the duly appointed and acting trustee of the estate of said bankrupt; and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of Septemer, 1923.

CHADWICK, McMICKEN, RAMSEY &
RUPP and

McCLURE & McCLURE,
Solicitors for Petitioner.

The foregoing claim of appeal is allowed this 8th day of September, 1923.

JEREMIAH NETERER,
United States District Judge Presiding in the
Above-named District.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [69]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

Assignment of Errors.

Comes now the petitioner, United States Fidelity & Guaranty Company, a corporation, and files the following assignment of errors, upon which it will rely on its appeal from the order and decree made

and entered by this Honorable Court on the 30th day of August, 1923, in the above-entitled matter:

I.

The United States District Court in and for the Western District of Washington, Honorable Frank C. Dietrich presiding, erred in adjudging and decreeing that the petition of the said United States Fidelity & Guaranty Company, a corporation, to set off its claim as set out and proved in said petitioner's claim and petition, verified August 22, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in Bankruptcy and against said United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand (\$22,000) Dollars and costs, be denied.

II.

The said Court erred in adjudging and decreeing that [70] the restraining order heretofore issued herein against said C. W. Ryan as trustee in bankruptcy, on petitioner's said petition, be dissolved.

III.

The said Court erred in adjudging and decreeing that said claim filed herein by said United States Fidelity & Guaranty Company, a corporation, be considered as a general claim.

WHEREFORE, the petitioner prays that the said order and decree of said Court be reversed, and the

said Court be directed to enter a decree as prayed for in said petition, verified August 22, 1923.

CHADWICK, McMICKEN, RAMSEY &
RUPP and

McCLURE & McCLURE,
Solicitors for the United States Fidelity & Guaranty
Company, a Corporation.

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Sep. 8, 1923. F. M. Harshberger, Clerk.
By P. A. Page, Deputy. [71]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND EN-
GINEERING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

Order Fixing Amount of Cost Bond.

This cause coming on for hearing upon the appli-
cation of the petitioner, United States Fidelity &
Guaranty Company, a corporation, to have the Court
fix the amount of the cost bond, and the Court being
duly advised in the premises;

IT IS HEREBY ORDERED AND DECREED that the amount of the cost bond of the said petitioner on appeal be and it is hereby fixed at the sum of Five Hundred (\$500.00) Dollars.

Done in open court this 8th day of September, 1923.

JEREMIAH NETERER,
United States District Judge, Presiding in Above-named Court.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [72]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,

Bankrupt.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Petitioner.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that the United States Fidelity & Guaranty Company, a corporation, as principal, and American Surety Company, of New York, a corporation, duly

incorporated under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington as surety are held and firmly bound unto C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, and his successors, in the sum of Five Hundred Dollars (\$500.00) for the payment of which sum well and truly to be made, we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of September, A. D. 1923.

The condition of this obligation is such that:

WHEREAS, in the above-entitled court and proceeding an order and decree was entered on the 30th day of August, 1923, wherein and whereby it was ordered and decreed, among other things, that the petition of the United States Fidelity & Guaranty Company, a corporation, to set off its claim as set out and proved in said petitioner's claim and petition, verified August 22, 1923, against that certain judgment rendered [73] in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against the United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand (\$22,000.00) Dollars and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved, and that said claim filed herein by said United States Fidelity & Guaranty Company be considered as a general claim; and that the said United States Fi-

delity & Guaranty Company having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the said order and decree, and a citation directed to the said C. W. Ryan, as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, is about to be issued, citing and admonishing him to be and appear in United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California;

NOW, THEREFORE, the condition of the above obligation is such that if the said United States Fidelity & Guaranty Company, a corporation, shall prosecute its said appeal to effect, and answer all costs that may be awarded against it if it fail to make said appeal good, then the above obligation is to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Corporate Seal] By C. H. CAMPBELL,
Associate Manager of its Puget Sound Department
Hereunto Duly Authorized.

AMERICAN SURETY COMPANY OF
NEW YORK, a Corporation.

By S. H. MELROSE,
Resident Vice-president.

* [Corporate Seal] Attest: J. L. JOLLY,
Resident Assistant Secretary.

Approved:

NETERER,
Judge. [74]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [75]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

**Admission of Service of Petition of United States
Fidelity & Guaranty Company for Appeal, etc.**

The undersigned hereby admits service and receipt of copies of the petition of the United States Fidelity & Guaranty Company, a corporation, for appeal, order allowing said appeal, said petitioner's assignment of errors, order fixing amount of cost,

bond, and said cost bond and citation on appeal this 19th day of September, 1923.

SIDNEY TEISER,

Of Solicitors for C. W. Ryan as Trustee in Bankruptcy of the Puget Sound Engineering Company, a Corporation, Bankrupt.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [76]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

Order Fixing Amount of Supersedeas Bond.

This cause comes on this day for hearing on the petition of the United States Fidelity & Guaranty Company, for an order fixing the amount of security which said petitioner shall give and furnish as a supersedeas on its appeal from the order and decree entered herein August 30, 1923, to the Circuit Court of Appeals for the Ninth Circuit, the

petitioner appearing by Chadwick, McMicken, Ramsey & Rupp and McClure & McClure, its attorneys and C. W. Ryan as trustee in bankruptcy of the estate of the Puget Sound Engineering Company, a corporation, the above bankrupt appearing by Sidney Teiser, and McMaster, Hall & Schaefer, his attorneys,

IT IS ORDERED:

1. That the amount of the security on appeal herein to be furnished by the said United States Fidelity & Guaranty Company as a supersedeas be and the same is hereby fixed at the sum of Twenty-five Thousand (\$25,000.00) Dollars.

2. That upon the making and filing with the clerk of this court of a good and sufficient bond in said sum by the said United States Fidelity & Guaranty Company, a corporation, with surety to be approved by the Court, all further proceedings in this court upon the petition of the said United States Fidelity & Guaranty [77] Company, a corporation, verified August 22, 1923, and in the Superior Court of the State of Washington for Thurston County in cause No. 7974 on the records of said court, including execution on the decree entered in said Superior Court, be superseded and stayed until the final determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit and until the further order of this court.

Done in open court this 20th day of September, 1923.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 20, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [78]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEERING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Petitioner.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, United States Fidelity & Guaranty Company, a corporation, as principal and the Fidelity & Deposit Company of Maryland, a corporation, duly incorporated under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Com-

pany, a corporation, bankrupt, and his successors, in the sum of Twenty-five Thousand and No/100 Dollars (\$25,000.00) for the payment of which sum well and truly to be made, we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 20th day of September, A. D. 1923.

The condition of this obligation is such that:

WHEREAS, the above-named United States Fidelity & Guaranty Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the order and decree entered in the above-entitled court and cause, August 30, 1923, wherein and whereby it was ordered and decreed among other things that the petition of the United States Fidelity & Guaranty Company, a corporation, to set off its claims, as set [79] out and proved in said petitioner's claim and petition, verified August 23, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against said United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand Dollars (\$22,000.00) and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved, and that said claim filed herein by said United States Fidelity & Guaranty Company be considered as a general claim; and the said United States Fidelity & Guaranty Company having ob-

tained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree, and a citation directed to the said C. W. Ryan as trustee in bankruptcy of Puget Sound Engineering Company, a corporation, bankrupt, is about to be issued, citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California; and the said United States Fidelity & Guaranty Company, having obtained an order fixing the amount of security which said petitioner shall give and furnish as a supersedeas upon said appeal, said order further providing that upon the making and filing with the clerk of this court of a good and sufficient bond in said sum to be approved by the Court, all further proceedings in this court upon the petition of said United States Fidelity & Guaranty Company, a corporation, verified August 22, 1923, and in the Superior Court of the State of Washington for Thurston County in cause No. 7974 on the records of said court, including execution on the decree entered in said Superior Court, be superseded and stayed until the final determination of said appeal by the United States Circuit Court of Appeals for [80] the Ninth Circuit and until the further order of this court.

NOW, THEREFORE, the condition of the above obligation is such that if the said United States Fidelity & Guaranty Company, a corporation, shall prosecute its said appeal to effect, and answer all damage and costs for failure to make said appeal

good, and pay said judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against the said United States Fidelity & Guaranty Company in the sum of Twenty-two Thousand Dollars (\$22,000.00) and costs in case said order and decree appealed from shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation is to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal] By JOHN C. McCOLLISTER,
Associate manager of its Puget Sound Department,
Hereunto Duly Authorized.

FIDELITY & DEPOSIT COMPANY, OF
MARYLAND, a Corporation.

[Seal] By J. A. CATHCART,
Its Atty. in Fact.

The foregoing bond approved this 20th day of
September, 1923.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States Dis-
trict Court, Western District of Washington,
Northern Division. Sep. 20, 1923. F. M. Harsh-
berger, Clerk. By P. A. Page, Deputy. [81]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

**Order Extending Time to and Including November
1, 1923, to File Record and Docket Cause.**

Upon motion of the United States Fidelity & Guaranty Company, as petitioner and appellant, by its attorneys that an order be made and entered herein extending until November 1, 1923, the time within which said petitioner and appellant shall file in the Circuit Court of Appeals for the Ninth Circuit, the record in the matter of its appeal from the order entered herein on August 30, 1923, and upon reading the affidavit of Henry F. McClure in behalf of said petitioner and appellant, it appearing to the Court on the records and files herein that good cause is shown for the granting of said order, the Court being fully advised,

IT IS ORDERED that the United States Fidelity & Guaranty Company be, and it is hereby, granted until November 1, 1923, to file in the Circuit Court of Appeals for the Ninth Circuit the record in the

matter of the appeal of said United States Fidelity & Guaranty Company from the order entered herein August 30, 1923, wherein and whereby it was ordered and decreed among other things that the petition of the United States Fidelity & Guaranty Company, a corporation, to set off its claim, as set out and proved in said [82] petitioner's claim and petition, verified August 23, 1923, against that certain judgment rendered in the Superior Court of Thurston County, Washington, in favor of C. W. Ryan as trustee in bankruptcy and against said United States Fidelity & Guaranty Company in the sum of \$22,000.00 and costs, be denied, and that the restraining order issued herein against the said C. W. Ryan as trustee on said petition be dissolved and that said claim filed herein by said United States Fidelity & Guaranty Company be considered as a general claim.

Dated at Seattle, in said district, this 6th day of October, A. D. 1923.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 6, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [83]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

Stipulation Re Transcript of Record.

IT IS HEREBY STIPULATED AND AGREED
by and between C. W. Ryan as trustee in bankruptcy
of the estate of said Puget Sound Engineering Com-
pany, a corporation, bankrupt, and the United
States Fidelity & Guaranty Company, a corporation,
that the clerk of the above-entitled court in preparing
and certifying to the United States Circuit Court
of Appeals for the Ninth Circuit the record herein
on the appeal of said United States Fidelity & Guar-
anty Company, a corporation, shall include therein
transcript of the following papers and proceedings
and none other, which papers and proceedings con-
tain a full and complete record in said cause of all
that is necessary to the determination of the mat-
ters involved in said appeal, and that the same shall
be so certified by the clerk of said court:

1. Claim and petition of the United States Fi-
delity & Guaranty Company, filed August 22, 1923.

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2. Order to show cause on said claim and petition, filed August 22, 1923.

3. Affidavit of trustee in answer to said petition, filed August 30, 1923, with exhibits annexed thereto.

4. Order upon said petition, filed August 30, 1923.

5. Petition for appeal and allowance of same, filed September 8, 1923.

6. Assignment of errors, filed September 8, 1923.

7. Order fixing amount of cost bond, filed September 8, 1923. [84]

8. Cost bond on appeal, filed September 8, 1923.

9. Citation on appeal, original, filed September 8, 1923.

10. Admission of service filed September 20, 1923.

11. Order fixing amount of supersedeas bond, filed September 20, 1923.

12. Supersedeas bond, filed September 20, 1923.

13. Order extending time to file record, filed October 6, 1923.

14. This stipulation.

IT IS FURTHER STIPULATED AND AGREED that the facts set forth in the affidavit of the Trustee in answer to the petition of the United States Fidelity & Guaranty Company which affidavit is denominated, "Affidavit in compliance with order to show cause" are true, and that the exhibits attached to the same were duly filed in the cause of the United States Fidelity & Guaranty Company, a corporation, plaintiff, vs. C. W. Ryan, as trustee in bankruptcy of the Puget Sound Engineering

Company, a corporation, bankrupt, et al., defendants, and instituted in the Superior Court of the State of Washington for the County of Thurston, and that such admission was made by the United States Fidelity & Guaranty Company, petitioner, in open court at the hearing in the District Court of the United States for the Western District of Washington, Northern Division, upon the claim and petition of the United States Fidelity & Guaranty Company filed August 22, 1923, prior to the entry of the order of August 30, 1923.

Dated October 8, 1923.

CHADWICK, McMICKEN, RAMSEY &
RUPP and

McCLURE & McCLURE,

Attorneys for United States Fidelity & Guaranty
Company, Petitioner. .

SIDNEY TEISER,

Of Attorneys for C. W. Ryan as Trustee in Bank-
ruptcy, as Aforesaid. [85]

[Endorsed]: Filed in the United States District
Court, Western District of Washington, Northern
Division. Oct. 13, 1923. F. M. Harshberger, Clerk.
By P. A. Page, Deputy. [86]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 6460.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,

Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,

Appellant,

vs.

C. W. RYAN, as Trustee of Puget Sound Engineer-
ing Company, a Corporation, Bankrupt,

Appellee.

**Certificate of Clerk U. S. District Court to Tran-
script of Record.**

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 86, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal

herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges [87] incurred, and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate and return	272
folios at 15c.....	\$40.80
Certificate of Clerk to transcript of Record,	
4 folios at 15c.....	.60
Seal to said certificate.....	.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$41.60, has been paid to me by attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 23d day of October, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [88]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

IN BANKRUPTCY—No. 6460.

In the Matter of the PUGET SOUND EN-
GINEERING COMPANY, a Corporation,
Bankrupt.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

Citation on Appeal.

United States of America,—ss.

The President of the United States to C. W. Ryan,
as Trustee in Bankruptcy of Puget Sound En-
gineering Company, a Corporation, Bankrupt,
GREETING:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit, to be held at the city of
San Francisco in the State of California, within
thirty days from the date of this writ, pursuant to
an appeal filed in the clerk's office of the District
Court of the United States for the Western District
of Washington, Northern Division, wherein United
States Fidelity & Guaranty Company, a corporation,
is appellant, and you, the said C. W. Ryan, trustee
in bankruptcy of Puget Sound Engineering Com-
pany, a corporation, bankrupt, are appellee, to show
cause, if any there be why the decree in the said ap-

peal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JEREMIAH NETERER, Judge of said District Court, this 8th day of September, 1923.

[Seal]

JEREMIAH NETERER,
Judge.

Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1923. F. M. Harshberger, Clerk. By P. A. Page, Deputy. [89]

[Endorsed]: No. 4123. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Puget Sound Engineering Company, a Corporation. United States Fidelity & Guaranty Company, a Corporation, Appellant, vs. C. W. Ryan, as Trustee in Bankruptcy of Puget Sound Engineering Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed October 29, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 4123.

UNITED STATES FIDELITY & GUARANTY
COMPANY, a Corporation,
Petitioner.

vs.

C. W. RYAN as Trustee in Bankruptcy of the Es-
tate of PUGET SOUND ENGINEERING
COMPANY, a Corporation,
Respondent.

In the Matter of PUGET SOUND ENGINEER-
ING COMPANY, a Corporation,
Bankrupt.

Stipulation Re Record on Review.

It is hereby stipulated and agreed by and between C. W. Ryan, as trustee in bankruptcy of the estate of the Puget Sound Engineering Company, a corporation, respondent above-named, and the United States Fidelity & Guaranty Company, a corporation, petitioner above-named, that the record on appeal of said petitioner from the order and decree made and entered by the United States District Court for the Western District of Washington, Northern Division, under date of August 30, 1923, as more particularly appears in and by the stipulation of the parties hereto made October 8, 1923, shall constitute and be the record on review herein, to the same extent and with the same effect as if the papers and

proceedings mentioned in said stipulation of October 8, 1923, were duly certified by the Clerk of said District Court and transmitted to this Court for filing in this cause.

Dated October 19, A. D. 1923.

SIDNEY TEISER,

Of Attorneys for C. W. Ryan, as Trustee in Bankruptcy of the Estate of the Puget Sound Engineering Company, a Corporation, Respondent, 740-748 Morgan Bldg., Portland, Oregon.

CHADWICK, McMICKEN, RAMSEY &
RUPP and

McCLURE & McClure,

Attorneys for United States Fidelity & Guaranty Company, a Corporation, Petitioner.

[Endorsed]: No. 4123. In the United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity & Guaranty Company, a Corporation, Petitioner, vs. C. W. Ryan, as Trustee in Bankruptcy of the Estate of Puget Sound Engineering Company, a Corporation, Respondent. In the Matter of Puget Sound Engineering Company, a Corporation, Bankrupt. Stipulation as to Record on Review. Filed Oct. 29, 1923. F. D. Monckton, Clerk.

